(32,109)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 542

MISSOURI PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

MARY I. AEBY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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[fols. a & 1] [Captions omitted]

[fol. 2] **IN CIRCUIT COURT OF ST. LOUIS**

60706-B

MARY I. AUBY

vs.

MISSOURI PACIFIC RAILROAD COMPANY, a Corporation

VERDICT AND JUDGMENT—January 11th, 1924; Filed in Supreme Court March 18, 1924

Now at this day comes the plaintiff by attorneys, and in open Court and in writing this day filed remits the sum of $6,500.00 from the verdict and judgment heretofore rendered herein in her favor, leaving the verdict stand for the residue thereof, to wit, the sum of $15,000.00. Thereupon it is ordered by the Court that the verdict and judgment [fol. 3] rendered herein November 15th, 1923, in favor of the plaintiff and against the defendant for the sum of $21,500.00 be and the same is hereby set aside and vacated, and a new judgment entered in favor of plaintiff and against defendant for the sum of $15,000.00 and costs.

Wherefore, it is considered and adjudged by the Court that the plaintiff have and recover of the defendant the sum of Fifteen Thousand Dollars ($15,000.00), together with the costs of this suit, and have therefor execution.

IN CIRCUIT COURT OF ST. LOUIS

[Title omitted]

ORDER ALLOWING APPEAL—Filed in Circuit Court January 26, 1924; in Supreme Court, March 18, 1924

Now at this day comes the defendant by attorney, and upon its motion and for good cause shown, the Court doth grant defendant ninety days additional time within which

[fols. 4-7] to file its bill of exceptions herein. Thereupon defendant files and presents to the Court an affidavit for appeal, and also presents to the Court an appeal bond, conditioned according to law in the penal sum of $30,150.00 with George W. Clarkson and Thomas C. Hennings as sureties, and prays an appeal to the Supreme Court of Missouri, and the Court having seen and examined said affidavit and bond, doth order that said bond be approved and filed, which is done, and that an appeal be and is hereby allowed the defendant to the Supreme Court of Missouri from the judgment or decision of the Court heretofore rendered herein.

Clerk's certificate to foregoing papers omitted in printing.

[fol. 8] In Supreme Court of Missouri, Division No. —, October Term, 1925

No. 25385

Mary I. Abby, Respondent,

vs.

Missouri Pacific Railroad Company (a Corporation), Appellant

Appeal from the Circuit Court, City of St. Louis, Missouri, Honorable Charles B. Davis, Judge

Appellant's Abstract of the Record from Circuit Court of St. Louis—Filed December 12, 1925

This suit was brought to the December, 1922, Term of the Circuit Court, City of St. Louis, Missouri, on the 17th day of November, 1922. Respondent filed her petition in the office of the clerk of said court, and on said date summons was duly issued directed to the Sheriff of the City of St. Louis, commanding him to summon appellant to appear in [fol. 9] said court at said December, 1922, Term thereof. Service of summons was duly had upon appellant.

Thereafter, by leave of Court, respondent filed her amended petition which (omitting caption and signatures) is as follows:

AMENDED PETITION

Plaintiff for her cause of action states that the defendant is a railroad corporation, operating a line of railroads in this state and also in the State of Arkansas through the Town or City of Magness, Independence County, Arkansas.

Plaintiff states that at all the times mentioned in said petition defendant was engaged in commerce between different states of the United States, to wit, between the State of Arkansas and the State of Missouri, and at all such times, as well as at the time of her alleged injury, the plaintiff was employed by defendant in interstate commerce, to wit, as a station agent at Magness in the State of Arkansas, located on defendant's line of railroad between the City of Newport in said State of Arkansas and the City of Joplin in the State of Missouri, and the defendant further states that the particular train mentioned in plaintiff's petition was a train which was operated and carried passengers and merchandise between said City of Newport, Arkansas, and said City of Joplin, Missouri.

Plaintiff for her cause of action states that on and prior to January 13, 1921, she was employed at Magness as station agent for defendant, and it was her duty to go from the station to the trains for the purpose of carrying on the business of said defendant, and that in doing so she was [fol. 10] required to pass over a platform extending from said station at Magness, Arkansas, to the tracks of the defendant and to return from said train to said station. Plaintiff states that on January 13, 1921, she, in obedience to the duties imposed upon her by the defendant, appeared at said station in the early morning before it was fully light to wait upon a train passing through said station; that in the discharge of her duty to defendant she did go to said station and delivered to said train, and received from said train, express, mail and messages such as the said train delivered and received at said station, and while returning from said train to said station she fell upon the platform of the defendant and was seriously injured as more particularly described hereafter. Plaintiff says that the

said defendant was guilty of negligence in this, to wit, said station platform was not lighted; said station platform was covered with snow, sleet and ice, and was so slick that one was liable to slip thereon, and the floor of said station platform was not level, but was so slanting that especially when covered with ice or snow it was slippery and slick and one was liable to fall thereon, and plaintiff says that at the time of her injury, and for a long time prior thereto, the surface of said platform was comprised of chat and fine gravel so loosely put together that depressions, holes and drains would form in it, leaving the surface uneven, slanting and with ridges and irregular places appearing on its surface, that defendant did not put or maintain troughs or gutters on its depot building, but alowed the water falling on the roof of said depot to fall on the chat or gravel platform in front of the door and caused said chat and [fol. 11] gravel to become loose, and so that a depression like a gully or through formed in front of the depot door, and the chat or gravel was carried away from in front of the door by persons passing in and out of said depot, and the water falling on said depot, and the said platform flowed towards the depression in front of said door and cut a depression or ditch in front of said door and around the corner of said depot that said ditch or depression has sharp, slanting sides and also slanted downward towards the end of the depot, and that in cold weather, when rain, snow and sleet fell, ice formed in the bottom and on the sides of said ditch or depression and formed a slick ice covered and irregular surface, rendering it unsafe and dangerous for a person to step into or upon said ditch or its sides; that at the time plaintiff slipped and fell the depot platform was dark and unlighted, and that she had no knowledge that said depot platform was in the unsafe and dangerous condition aforesaid, nor could she have knowledge of such fact, by the exercise of ordinary care, and plaintiff says that on the date aforesaid she, in passing over said platform, stepped upon and into said ditch or depression, and upon the irregular surface of same, and that the same was then covered by a coating of ice, snow and sleet, and that when she stepped, as aforesaid, she slipped and fell violently to the station platform and that as a direct result of said fall she was greatly and seriously injured, her uterus ruptured,

and she suffered internal hemorrhages frequently, her spine curved, and she was made sick and sore as a result of said injuries, and it became necessary for her, on account of said injuries, to submit, and she did submit, to two [fol. 12] serious operations and her appendix was removed and one ovary removed, and she has been made sick and sore and permanently injured and confined to her room or to a hospital for more than half the time since she was injured; that she was earning good wages at the time of her injuries, and since such date has been unable to earn anything, and she will not be able to earn anything in the future; that she has suffered great anguish of mind and pain of body and has been damaged in the sum of thirty five thousand dollars ($35,000.00), for which sum, together with costs, she prays judgment.

To this petition appellant filed a general demurrer, which (omitting caption and signatures) is as follows:

DEMURRER AND ORDER OVERRULING SAME

Comes now the defendant in the above entitled cause and files this, its demurrer to the amended petition of plaintiff filed herein, and, for grounds of this demurrer, defendant says that said amended petition does not state facts sufficient to constitute a cause of action against defendant.

Thereafter, by order duly entered of record, appellant's demurrer to said amended petition was by the Court overruled.

Afterwards, appellant filed its answer to said amended petition, which answer (omitting caption and signatures) is as follows:

[fol. 13] ANSWER

Comes now the defendant in the above entitled cause and at all such times, as well as at the time of her alleged petition of plaintiff filed herein, and, for answer to said amended petition, defendant admits that at all the times mentioned in said petition defendant was engaged in commerce between different states of the United States, to wit,

between the State of Arkansas and the State of Missouri, and at all such times, as well as at the time of her alleged injury, the plaintiff was employed by defendant in interstate commerce, to wit, as a station agent at Magness, in the State of Arkansas, located on defendant's line of railroad between the City of Newport in said State of Arkansas and the City of Joplin in the State of Missouri, and defendant further admits that the particular train mentioned in plaintiff's petition to which plaintiff was required to deliver and from which she was required to receive, express, mail and messages, was a train which was operated, and carried passengers and merchandise, between said City of Newport, Arkansas, and said City of Joplin, Missouri, and defendant denies each and every other allegation in said amended petition contained.

Further answering said amended petition, defendant states that whatever injuries, if any, were sustained by the plaintiff on the occasion mentioned in said amended petition, were the result of plaintiff's negligence directly contributing thereto, in this: That on the occasion mentioned in said petition all of the alleged unsafe and dangerous conditions of the depot platform mentioned in said petition [fol. 14] were open and obvious to anyone, and especially to plaintiff, while passing over said platform, and defendant states that plaintiff either knew, or by the exercise of ordinary care would have known, of the existence, size, exact location and all of the alleged conditions of whatever depression or ditch, if any, was in front of the door of the station and whether the sides of such depression or ditch, if any, slanted, and, if so, to what extent, and whether snow, sleet or ice, could or did accumulate or was present therein at the time of and immediately prior to her alleged injury, and, in passing along or over said platform, plaintiff could have, by the exercise of ordinary care for her safety, avoided coming in contact with, and being injured by, such depression or ditch, if any, and with whatever snow, sleet or ice, if any, was in such ditch; but defendant states that on said occasion, while passing over said platform, plaintiff failed to exercise ordinary care to avoid coming in contact with, or stepping upon or into, such depression or ditch, if any, and the snow, sleet or ice, if any, therein.

Further answering said amended petition, defendant states that at all the times mentioned in said petition defendant was engaged in commerce between the different states of the United States, as alleged in said petition and as admitted herein, and that at all such times, as well as at the time of her alleged injury, plaintiff was employed by defendant in interstate commerce, and defendant further states that all of the conditions existing at said station and in and upon said station platform, with respect to either light or the lack of light, to the alleged depression or ditch in said platform, and the alleged slant of the sides thereof, [fol. 15] and with respect to the snow, sleet or ice, if any, therein, as well as whatever dangers, if any, existed as the result of such alleged conditions, were all open and obvious to anyone, and especially to plaintiff, while passing over said platform and were either known to and appreciated by the plaintiff, or by the exercise of ordinary care on her part, could have been known and appreciated by her, and defendant further states that plaintiff assumed all risks of injury incidental thereto or likely to result therefrom while passing over said platform, for which reason plaintiff is not entitled to recover against defendant.

Wherefore, having fully answered, defendant prays to be hence dismissed with its costs.

Verdict and Judgment

Thereafter, on the 14th day of November, 1923, which was one of the days of the October, 1923, Term of said court, said cause came on for trial and the trial thereof was begun in Division No. 5 of said court, before the Honorable Charles B. Davis, Judge of the Circuit Court, City of St. Louis, Missouri, presiding in Division No. 5 thereof, and a jury, and said cause remained on trial throughout said 14th day of November, 1923, and the following day, viz., the 15th day of November, 1923, and on said 15th day of November, 1923, which was one of the days of the October, 1923, Term of the Circuit Court, City of St. Louis, Missouri, said trial resulted in a verdict and judgment in favor of respondent and against appellant for the of $21,500.00

[fol. 16] **Minute Entries of Trial**

Motion for New Trial.

Thereafter, on the 17th day of November, 1923, which was one of the days of the October, 1923, Term of the Circuit Court, City of St. Louis, Missouri, and within four days after the trial of said cause, and after the rendition of the verdict of the jury in said cause and of the entry of judgment thereon, appellant filed its motion for a new trial.

Motion in Arrest of Judgment

And thereafter, on said 17th day of November, 1923, appellant filed its motion in arrest of judgment.

Order Continuing Cause

And thereafter appellant's said motions for new trial and in arrest of judgment were by the Court, by order duly entered of record, continued to the December, 1923, Term of the Circuit Court of the City of St. Louis, Missouri.

Order for Remittitur

And thereafter, on the 7th day of January, 1924, the same being one of the days of the December, 1923, Term of the Circuit Court, City of St. Louis, Missouri, it was ordered by the Court, by order duly entered of record, that, if within five days from said date, respondent entered a remittitur in the sum of $6,500.00 appellant's motion for a new trial would be overruled, but that if respondent should elect not to file said remittitur appellant's said motion for [fol. 17] a new trial would be sustained on the ground that the verdict was excessive.

Remittitur and New Judgment

Thereafter, on the 11th day of January, 1924, which was one of the days of the December, 1923, Term of said court, respondent filed her remittitur in the sum of $6,500.00 from the verdict and judgment which were rendered on the 15th day of November, 1923, in the said sum of $21,500.00; whereupon said judgment of November 15, 1923, was by the Court, by order duly entered of record, set aside, and on said 11th day of January, 1924, a new judgment was rendered by the Court in favor or respondent and against appellant in the sum of $15,000.00.

Order Overruling Motion for New Trial

And thereafter, on the 14th day of January, 1924, same being one of the days of the December, 1923, Term of the Circuit Court, City of St. Louis, Missouri, appellant's motion for a new trial was by the Court, by order duly entered of record, overruled.

Order Overruling Motion in Arrest of Judgment

And thereafter, on said 14th day of January, 1924, appellant's motion in arrest of judgment was by the Court, by order duly entered of record, overruled.

Order Allowing Appeal

And thereafter, on the 26th day of January, 1924, the same being one of the days of the December, 1923, Term of [fol. 18] the Circuit Court, Cit yof St. Louis, Missouri, and during the same term of said court at which appellant's motion for a new trial and in arrest of judgment were overruled, appellant was by the Court, by order duly entered of record, allowed ninety days within which to file its bill of exceptions herein, and on said 26th day of January, 1924, appelant filed its appeal bond, with sureties which

were approved by the Court, and on said 26th day of January, 1924, and during the December, 1923, Term of the Circuit Court, City of St. Louis, Missouri, appellant filed and presented its application and affidavit for appeal and was by the Court, by order duly entered of record, allowed an appeal in said cause to the Supreme Court of Missouri.

Resignation of Trial Judge

And thereafter, on the 4th day of February, 1924, the Honorable Charles B. Davis, Judge of the Circuit Court, City of St. Louis, Missouri, Division No. 5 thereof, before whom said cause was tried, tendered his resignation to the Governor of the State of Missouri as such Judge, which resignation was by the Governor accepted and the term of said Charles B. Davis as Judge of said court ended and he was succeeded as Judge in Division No. 5 of said Circuit Court by the Honorable William H. Killoren, Judge of the Circuit Court, City of St. Louis, Missouri.

Order Settling Bill of Exceptions

And thereafter, on the 10th day of June, 1925, and within the time provided by law therefor, appellant presented its bill of exceptions to the Circuit Court, City of St. Louis, [fol. 19] Missouri, Division No. 5 thereof, and said bill of exceptions was approved, allowed, sealed and signed by the Honorable William H. Killoren, Judge of said Circuit Court presiding in Division No. 5 thereof, on said 10th day of June, 1925, and was on said date ordered filed, and filed, and by order duly entered of record and made a part of the record herein.

Bill of Exceptions

Said bill of exceptions is, in its entirety, as follows (and where possible, in accordance with the rules of this Court, is set forth in narrative form):

Caption

Be it remembered that on Wednesday, November 14th, 1923, the above-entitled cause came on for trial and was tried before the Honorable Charles B. Davis, Judge, and a jury, in Division No. 5 of the Circuit Court of the City of St. Louis, State of Missouri, the plaintiff being represented by Messrs. Abbott, Fauntleroy, Cullen & Edwards (by Mr. John B. Edwards) and John Vogel, Esq., and the defendant being represented by M. U. Hayden, Esq., at which time the following proceedings were had, to wit:

Plaintiff, to sustain the issues on her behalf, offered and introduced the following evidence:

[fol. 20] Plaintiff's Evidence

Ida Aeby, being first duly sworn, testified in her own behalf as follows:

Direct examination by Mr. Edwards:

I am 36 years of age. I live at 4295 Olive street, St. Louis. That is the Y. W. C. A. I have been staying there since the 12th of last month. I began to work for the Missouri Pacific Railroad Company at Morefield, Arkansas, on March 20, 1919. My people lived on a farm about five miles from Batesville. Morefield is five miles from Batesville and Magness is fourteen miles from Batesville. I first went to work at Morefield, about five miles from my home, as a ticket agent and I worked there until July, 1920. I then went to Magness, Arkansas. That is a town of about 400 people. I began to work in July, 1920, at Magness, Arkansas, as station agent.

Q. Now, what were your duties as station agent; what did you do?

A. I did the book work; sold tickets; handled the express and freight work. I worked as station agent for the Missouri Pacific Railroad Company. I began work there on the 2nd of July, 1920. I had a helper there at that time. That was Mr. Puckett. At that time I had a conversation with the Division Superintendent, Mr. J. W. Daniels.

Q. What did he tell you, if anything, with reference to your work there?

A. He told me to discharge the helper we had at the pres-
[fol. 21] ent time and carry Mr. Garner's name on the pay roll.

Mr. Hayden: Defendant wants to object to any further testimony under this petition for the reason that it doesn't state facts sufficient to constitute a cause of action.

The Court: Overrule the objection.

To which ruling of the Court defendant then and there duly excepted and still continues to except.

And he told me to discharge Mr. Pucket and carry Mr. Garner's name on the pay roll as helper and do the work myself. He told me that I should draw all the pay except the time Mr. Garner worked and then the pay should go to him. He told me to do all the work myself. That had to do with the placing of the trucks and handling of the express. After that, I was supposed to put the trucks on the platform for baggage, express and the United States mail to be delivered on. I was to meet all the trains. We had a morning train at 6:18, a local train at 8:50, another local train at 12:28 and another passenger train at 6:41 in the evening. The train at 6:18 in the morning was bound north from Newport, Arkansas, to Joplin, Missouri. The train that was due there at 6:41 was bound south to Newport. The evening and morning trains were fast trains. The 8:50 and 12:28 noon trains were local trains, mixed trains, part freight and part passenger. The station at Magness, Arkansas, faces north and is so faced in January, 1921. The door to the station is at the west end. Directly east of the door there is a sort of bay window and extension.

[fol. 22] Q. At the time on the 13th of January, 1921, was there any protection built over the door to the station?

A. No, sir.

Q. At that time was there any plank in front of the foot of the steps of the station leading west?

A. No, sir.

Q. At that time was there any guttering on the station?

A. No, sir.

Q. State whether or not the roof of the station extended over the steps.

A. It did not.

Q. Well, did it extend down partly?

A. Just a few inches.

Q. Up at the top?

A. Yes.

Q. A few inches over?

A. Yes.

Q. Now, of what substance was the platform constructed?

A. Chat. Chat is small gravel, crushed-up rocks. Something like a cinder path. Some of the pieces were as big as a half dollars. That platform extended in front of the station from the building to the tracks. There was a slope to the platform towards the south—that would be from the train tracks towards the station.

Q. Miss Aeby—well, do you remember what, if anything, was the condition of the platform immediately in front or immediately north of the steps leading up into the station?

A. They were a drain in front of the steps.

Q. You say there was a drain in front of the steps?

A. Yes.

Q. Do you know from your observation what caused the drain?

A. By the passage of people passing in and out and also by the water running in front of the door.

[fol. 23] Q. From where did the water come that ran in front of the door?

A. Off of the house, the building.

Q. Off of the building?

A. Yes, sir.

Q. You say that there was a slope now and a drain in front of the steps?

A. Yes, sir.

Q. How much lower was the base of the drain from the highest portion of the platform?

A. About twelve inches.

Q. How much lower was the base of the drain from the portion of the platform immediately adjacent to it?

A. It was about four inches.

Q. How big was this place that you call a drain?

A. It was something like four, maybe four or five, feet square; something like that.

Q. Had there been any freeze in Arkansas at Magness the winter of 1920 and 1921 prior to the 13th of January, 1921?

A. Nothing like at that time.

Q. Well, had there been any storm where the water had frozen prior to that?

A. No.

Q. Had not?

A. No.

Q. That is, from the time you began to go to work, had there been any up until this time of the 13th of January?

A. Not to my recollection.

Q. Where did you live and with whom did you live when you first went to Magness?

A. Mr. and Mrs. Sherman.

Q. How far did Mr. and Mrs. Sherman live from the station?

A. It was about two blocks.

Q. Did you board with them?

A. Yes, sir.

Mr. Edwards: I will ask that this paper be marked as "Plaintiff's Exhibit A."

(Said paper was marked by the reporter as "Plaintiff's Exhibit A.")

[fol. 24] Mr. Edwards:

Q. I show you a letter dated October 27th, 1920, signed "J. W. Daniels, Superintendent," which has been marked "Plaintiff's Exhibit A," and ask you if you received that letter?

A. Yes, sir.

Mr. Edwards: We offer this in evidence, if the Court please.

Mr. Hayden: I don't think it is material to any issue, but I will not object to it.

Mr. Edwards (reading): "Aurora, Missouri, October 27th, 1920," marked "File" at the top. "Miss M. I. Aeby, Agent, Magness. Replying to your letter of October 25th, there is no objection, Miss Aeby, to you doing light housekeeping in Magness depot, providing colored waiting room is kept available for colored passengers should we have any from that point at any time. I do not think our business at Magness is such as to justify having a telephone in the depot, although there is no objection to you having one put in and paying for it for your own convenience. J. W. Daniels, Superintendent."

Mr. Edwards:

Q. Now, after this letter from the superintendent dated October 27th, 1920, did you discontinue boarding with Mr. and Mrs. Sherman and move into the station?

A. December 8th I did.

Q. On the 8th of December, 1920?

A. Yes, sir.

Q. So, where did you live from and after the 8th of December, 1920, until the 21st of January, 1921?

A. At the station.

On the evening of the 12th day of January, 1921, I met the train that was southbound at 6:41. There is a later train through there in the evening called the Hot Shot. That train does not stop unless it is flagged. On the evening of the 12th of January, 1921, when I met the south-[fol. 25] bound train, it was not stormy. It began raining later. I do not know at what hour, but some time in the early part of the night. I did not go out from the station from the time I met the 6:41 southbound train until morning. I don't remember what time the 6:41 train came through that night. I don't think it was as late as 9 o'clock. I was there in the station and Miss Williamson was with me. The first time I went out of the station after the 6:41 train went south on the night of the 12th was the morning of the 13th at about 6:10. At that time it was dark. The sky was all cloudy. When I went out at 6:10 on that morning I found that it had sleeted and snowed. I had observed rains before that on the platform. I had observed the water would run before the door.

Q. All the water stuck into the platform?

A. Yes, sir.

Q. Did the platform absorb water?

A. Yes.

Q. When you went out on the morning of the 13th of January at about ten minutes after 6 how much snow was there on the platform?

A. About two or three inches.

Q. Now, Miss Aeby, when you came down those steps of that station going out on the platform that morning what did you go down there for?

A. To put the truck on the platform.

Q. To put the truck on the platform?

A. Yes.

Q. Where was the truck?
A. At the west end of the house.
Q. How far west of the end of the station?
A. About ten feet.
Q. Ma'am?
A. About ten feet.
Q. Now, when you went down those steps to get that [fol. 26] truck which way did you go from the steps?
A. I stepped off the west end of the steps, west.
Q. You stepped off the west end of the steps west and went over how far to the truck?
A. About ten feet.
Q. Then you got the truck and what did you do with the truck?
A. Put it out on the platform about twenty or twenty-five feet.
Q. How far from the railroad track north of the station—how far did you put it from the railroad tracks?
A. About five feet.
Q. Well, was it directly in front of this entrance or was it east of it or west of it?
A. It was west.
Q. Why did you put the truck there?
A. Why, for baggage, express and mail to be loaded on.
Q. From what train?
A. Two fourteen.
Q. Two fourteen is the number?
A. Yes.
Q. And that was due to arrive——
A. Six eighteen.
Q. From the south, going to Joplin?
A. Yes, sir.
Q. Well, now, then, at that time did you notice anything in connection with the situation in front of those steps?
A. I did not as I went out.
Q. After you had placed the truck by the railroad tracks in what direction or from what direction did you enter those steps again?
A. From the north.
Q. Did you come in practically due north or from the east or west?
A. From the north.

Q. Well, just explain what took place to you as you came near the base of those steps?

A. I slipped and fell backwards and overbalanced myself and went down into the ditch.

Q. Now, when did you begin to slip?

A. Just as I got on the—just before I got onto the ice.

Q. Where was there ice—I will ask you this: Did you [fol. 27] observe the condition of this depression before you fell?

A. No.

Q. Did you observe the condition of this depression after you fell?

A. After I fell, yes.

Q. Now, then, what did you find to be the condition of this depression after you fell?

A. It was ice; snow and ice.

Q. Well, was it smooth, rough or what?

A. It was rough.

Q. Was it even or uneven?

A. Uneven.

Q. Now, where did you fall, in this drain, in this depression?

A. Yes, sir.

Q. Do you remember how you slipped there?

A. Yes; I was first thrown backwards and then forwards into the ditch.

Q. You fell first backwards?

A. Yes.

Q. And then forwards?

A. Yes.

Q. Now, I wish you would just stand up and describe, as you described it to us in our office, the way you fell there.

A. Why, I was walking, and my feet went out from under me and I fell back, my weight going on the left side, and trying to overbalance myself, I went forward and this whole side went down onto the ground.

Q. I asked you, I believe, with reference to snow on the platform?

A. Yes, sir.

Q. How much snow did you say there was?

A. Something like two or three inches.

Q. Was there snow over this situation in front of the steps, too?

A. Yes, sir.

Q. Now, when you fell as you say you fell, then what did you do?

A. I pulled up by the steps and walked into the station.

Q. Did you meet the train?

A. Yes.

[fol. 28] Q. Now, what portions of your body, if any, did you immediately observe were troubling you?

A. My left shoulder and back and through my left side.

Q. Whereabouts in your back?

A. Between the shoulders and below the waist.

Q. Now, Miss Aeby, was this—at the time of this fall were you menstruating then?

A. No, sir.

Q. When had you last?

A. December 24th.

Q. How frequently were your intervals, how frequently did that occur?

A. Every twenty-eight days.

Q. Every what?

A. Twenty-eight days.

Q. Every twenty-eight days?

A. Yes, sir.

Q. And for how long?

A. Four days.

Q. I will ask you to state whether or not they were regular?

A. Yes, sir.

Q. Do you know whether they were normal or not as to amount?

A. Yes, sir.

Q. Had you ever had any trouble in that regard before?

A. No, sir.

Q. Had you had any illnesses before the 13th of January, 1921?

A. I had had pneumonia, influenza and pneumonia.

Q. When did you have pneumonia and influenza?

A. 1918.

Q. Those two came together, did they?

A. Yes.

Q. When in 1918 did you have influenza and pneumonia?

A. It was in November.

Q. Had you had any other illnesses?

A. Never since 1913. In 1913 I had a little spell of the fever; sick a few days in 1913.

Q. Now, had you had any trouble with your ovaries or your uterus or your private parts at all prior to the 13th of January, 1921?

A. No, sir.

[fol. 29] Q. What had been the general condition of your health?

A. Good.

Q. Apart from this matter back in 1914 and this pneumonia and flu in 1918, had you had any illnesses?

A. No, sir.

Q. What did you notice, if anything, on the 13th of January, 1921, with reference to your flow?

A. Trouble with my back and shoulder.

Q. Well, did you notice anything as to whether or not you were flowing?

A. Yes, sir.

Q. Were you?

A. Yes, sir.

Q. Did that continue or discontinue?

A. Continued.

On the 2st of January I was notified to surrender the station to Mr. Eden. He had been there before I was placed there. I first consulted a physician on the 26th of January. I first consulted Dr. Davis. He was just a family physician at Batesville. I went to Batesville on the Sunday following the 21st day of January—the 23rd. My folks lived five miles from Batesville. I went out to my mother's home on the 24th. I had Dr. Davis look at me at Batesville. I also had Dr. Lawrence. He was the Missouri Pacific doctor. He examined me at my home on the farm on the 29th of January. I stayed at my mother's home near Batesville about four or five days. I then went to my sister's in Batesville and from there I went to the hospital at Little Rock. Dr. Lawrence told me to go to the hospital in Little Rock. He and my sister and brother in-law went with me to the hospital. Dr. Lawrence went from Batesville to Little Rock with me.

Q. What was your condition, now, when Dr. Lawrence took you from Batesville down to Little Rock?

[fol. 30] A. My condition was very weak with a very bad hemorrhage.

Q. Had Dr. Lawrence performed any operation on you?

A. No, sir.

Q. Were you still flowing?

A. Yes, sir.

Q. Did you have a temperature?

A. I don't know whether I did or not.

Q. You don't know that?

A. No.

Q. Well, now, then, when did you enter a hospital at Little Rock?

A. In February, February 9th, when I left Batesville.

Q. How long did you stay in that hospital?

A. March 10th.

Q. Who waited on you in the hospital at Little Rock from February 9th to March 10th?

A. Dr. Smith.

Q. How long did Dr. Lawrence stay with you down there, do you know?

A. I don't know. I think he left that night.

Q. Left that night?

A. Yes, sir.

Q. Were you operated upon in the hospital at Little Rock?

A. Yes, sir.

Q. Do you know when?

A. The 10th of February.

Q. On the 10th of February, 1921?

A. Yes, sir.

Q. When you left the hospital on March 10, 1921, where did you go?

A. Batesville.

Q. Back to Batesville?

A. Yes, sir.

Q. How long did you stay in Batesville?

A. I stayed in Batesville practically all the time until I came to St. Louis.

Q. When did you come to St. Louis?

A. June 11th.

Q. Now, then, on June 11th, 1921, when you came to St. Louis, where did you go?

A. To the hospital.

Q. What hospital?

A. Missouri Pacific.

[fol. 31] Q. Where is the Missouri Pacific Hospital in St. Louis?

A. California avenue, 1600 south.

Q. 1600 California avenue?

A. Yes, sir.

Mr. Hayden: That is where it was at that time.

Mr. Edwards: That is right; you have got a new one now.

Mr. Edwards:

—. Mr. Hayden suggests now it is out on Grand Avenue, but where was it in 1921?

A. 1600 South California avenue.

Q. That is where you went, to the old Missouri Pacific Hospital?

A. Yes, sir.

Q. How long did you stay in the Missouri Pacific Hospital at 1600 California?

A. September 5, 1922.

Q. That is practically fifteen months. Were you away at any time during that period?

A. Yes, sir.

Q. How many times?

A. I can't say just how many times.

Q. For how long a period?

A. About, maybe, ten days at a time.

Q. And where did you go?

A. Went home, back to Arkansas, Batesville.

Q. Batesville?

A. Yes, sir.

Q. You don't remember how many times you were gone for a period of ten days from the 10th of June, 1921, until the 5th of September, 1922?

A. I went home the first time the 26th of August and returned to the hospital the 8th of September, and the next time the 29th of November, and returned the 14th of December, and the next time I believe was some time in

January I went home; I don't remember just the date. I was home a few days and came back the 28th of February

Q. How much had you been making at the time you were [fol. 32] injured?

A. My salary run from $150.00 to $165.00.

Q. One hundred fifty dollars to one hundred sixty-five dollars?

A. One hundred fifty dollars to one hundred sixty-five dollars, yes.

Q. Was that per month?

A. Yes, sir.

Q. Now, then, from the 13th of January, 1921, until the 5th of September, 1922, did you earn anything?

A. No.

Q. What, if anything, was done for you at the Missouri Pacific Hospital—I mean, or done to you?

A. I was operated on.

Q. What is that?

A. Operated on.

Q. Do you know what was removed from you, if anything?

A. The right ovary, appendix, the ligaments were shortened and curetted.

Q. Who performed that operation?

A. O. B. Zeinert.

Q. He is the physician with the Missouri Pacific there, is he?

A. Yes, sir.

Q. When was that your right ovary and your appendix were removed and the ligaments shortened, did you say?

A. Yes, sir.

Q. Now, when was that?

A. Twenty-first of June, 1921.

Q. 1921?

A. Yes.

Q. Now, in the hospital in Batesville and in the hospital in St. Louis did you suffer any pain?

A. Yes, sir.

Q. What was your general condition with reference to that?

A. I don't understand your question.

Q. Well, how much of the time were you confined to your bed and how much of the time, if you know, did you have fever; what was the situation?

A. Well I was in bed practically all the time, not only but [fol. 33] a few days at a time could I stay on my feet.

Q. I said the hospital at Batesville, Mr. Hayden says I ought to have said the hospital at Little Rock; that is correct. Now, you have told the jury about the operation at Little Rock and the operation here and the length of time you were in those two hospitals, and that you left on the 5th of September, 1922?

A. Yes.

Q. Now, then, after you got out of the hospital on the 5th of September, 1922, what did you do?

A. I went back to Batesville, went home.

Q. You went back to Batesville?

A. Yes, sir.

Q. From St. Louis?

A. Yes, sir.

Q. How long did you stay in Batesville after you left the hospital in St. Louis, the Missouri Pacific Hospital, on the 5th of September, 1922?

A. Stayed there until December.

Q. Then during that time did you work?

A. No.

Q. Did you run a temperature?

A. Yes, I run a temperature and I had hemorrhages.

Q. Had hemorrhages?

A. Yes, sir.

Q. Now, from where did you have these hemorrhages?

A. Uterus.

Q. When did you leave Batesville in December, 1922?

A. Seventh.

Q. Seventh of December?

A. Yes.

Q. Then where did you come?

A. St. Louis.

Q. Now, won't you tell us, just tell us from the 7th of December, 1922, until this time, which, I believe, is the 13th of November, 1923, during these eleven months now, just tell us in your own way what you have done and what your condition has been.

[fol. 34] A. I worked a while last winter; I worked at Smith-Daniels Clothing Company a litle over three months.

Q. When?

A. A little over three months.

Q. Beginning when and ending when?

A. I began the 4th of January and I don't remember just what day I quit, and I worked three weeks at Coleman-Bryan's.

Q. How much did you make at Smith-Daniels?

A. Fifteen dollars a week to begin with, and then they give me eighteen later.

Q. And then you worked where?

A. Coleman-Bryan.

Q. How much did you make there?

A. I only worked there three weeks, made about twelve or fifteen dollars a week.

Q. Now, then, after that where did you work?

A. I worked about a month at the Statler Hotel.

Q. What were you doing at the Statler Hotel?

A. Floor inspector.

Q. How long did you work there?

A. From the 21st of May until the 26th of June.

Q. Now, what was your condition during the days that you were working at Smith Daniels and Coleman-Bryan and the Statler?

A. I run a temperature practically every day, and also had hemorrhage, hemorrhages mostly all the time.

Q. Hemorrhages from the uterus?

A. Yes, sir.

Q. The last place was the Statler where you said you worked as floor inspector?

A. Yes, sir.

Q. Now, what was your condition then?

A. I was running temperatures; I was running temperature of almost two degrees of fever the day I left there.

[fol. 35] Q. Have you done any work since you left the Statler Hotel?

A. No, sir.

Q. In June, I believe, of 1923?

A. No.

Q. Do you know whether you are running temperature now?

A. Yes, sir.

Q. Do you have any discharges, abnormal discharges, from the uterus?

A. Yes.

Q. What was the condition of that platform on the morning of the 13th of January, 1921, with reference to light?

A. There was no light on the platform.

Q. You have described the grayness of the morning and the darkness of the morning, I believe?

A. Yes.

Q. Where did you have any lights in the building?

A. There was one light in the office and one light in the waiting room.

Q. Did that throw any light onto the space in front of the steps?

A. No.

Q. You say you had one light in this window which was just east of the steps, in the bay window?

A. Yes, sir.

Q. And one light where?

A. In the waiting room.

Q. That is inside the building?

A. Yes, sir.

Q. Anything else?

A. One lantern.

Q. Where was the lantern?

A. The lantern was in the waiting room.

Q. The lantern was in the waiting room?

A. Yes, sir.

Q. Now, I showed to the jury when I was attempting to make an opening statement to them a picture which is marked and attached to the deposition, marked as follows: "Plaintiff's Ehibit A, Joe McCall, N. P," that means notary public, I take it, stationed at Magness, Arkansas. I will [fol. 36] ask you to look at this picture and state whether or not that picture with the exception of the plank at the bottom of the steps and the projection immediately over the door represents the portion of the station at Magness as it was on the day that you were there?

A. Yes, sir.

Q. Now, then, this part that has a projection over the door and a plank in front of the steps, were they there at that time?

A. No, sir.

Q. Did Mr. Morfit examine you this morning with reference to your condition?

A. Yes, sir.

Q. Was there any guttering around the roof of this building?

A. No, sir.

Cross-examination by Mr. Hayden:

I first entered the employ of the Missouri Pacific in March, 1919. At that time I was employed as agent at Morefield, Ark. Morefield is west of Magness and between Magness and Batesville. I remained in the employ of the Railroad as agent at Morefield until July, 1920. Morefield is a smaller place than Magness. At that time I do not know who was the agent at Magness. Before July, 1920, Mr. Eden was agent there. In July, 1920, he went away on leave of absence and I was given the job as agent at Magness while he was away. I began work there in July, 1920, and I continued to be in the employ as station agent at Magness, Ark., from July 20, 1920, until June 21, 1921.

Q. During that time you were in sole charge there at that station at Magness, weren't you?

A. Practically.

Q. Well, as a matter of fact, you were, weren't you? When you went to work there, there was a man by the name [fol. 37] of Puckett there that was caretaker?

A. Yes, sir.

Q. How long did he continue in the employ after you went to Magness?

A. Until August.

Q. And then you discharged him, did you not?

A. By the orders of the superintendent.

Q. Well, you discharged him?

A. Yes, I told him I had orders to discharge him. I am the one who told him he was no longer in the employ of the company. Thereupon I employed Garner. The superintendent told me to employ Garner who at that time was out on a farm. Mr. Garner had once been agent there and also helper, and the superintendent had met him.

Q. Who was it sent for Mr. Garner to go to work there?

A. I talked to him.

Q. How had you talked to him, over the telephone, or go to see him?

A. I talked to him personally when he came to Magness.

Q. Did you send for him to come to Magness?

A. No, I didn't send for him.

Q. How did he happen to come?

A. He come down to Magness every few days.

Q. And on one of these occasions you talked to him and told him he could have the job?

A. Yes.

Q. And he was to get seventy-five dollars a month as caretaker?

A. I was to get practically the money. I was to carry his name as helper and do the work myself, and the money was to go to me. He was to sign the checks over to me.

Q. Under your arrangement there you were also paid if you worked overtime, were you not?

A. Beg pardon; I didn't understand that question.

[fol. 38] Q. I say you were also paid extra if you worked overtime while you were working there as agent, were you not?

A. Yes.

Q. Your hours as agent were from 8 o'clock in the morning until 5 in the afternoon?

A. Yes, sir.

Q. And if you worked at any other hours than before 8 o'clock in the morning or after 5 you were paid for overtime, were you not?

A. Yes.

Q. How much extra were you paid?

A. I was never paid but very little.

Q. That is not what I asked you. How much extra were you paid when you were paid for overtime?

A. I was paid time and a half time.

Q. Now, of course, while you were agent there from July, 1920, until January, 1921, rain had fallen on several occasions in that vicinity, had it not?

A. Yes.

Q. And you had observed that when it fell the rain fell from the roof; it made this ditch or drain in front of the station?

A. Yes, I noticed that.

Q. And when the rain would first fall the water would accumulate there in front of the station and then later the chat would absorb it or it would run away?

A. Yes.

Q. But when the rain first fell it formed there in puddles in front of the ditch or station, did it not?

A. Yes.

Q. You had often noticed that whenever it rained?

A. Yes.

Q. It rained on the 11th of January, 1921, didn't it, two days before this accident?

A. I don't remember.

Q. Do you remember that you kept a book there in which [fol. 39] you entered the state of the weather?

A. Yes.

Q. You don't remember whether it rained on the 11th of January or not?

A. No, I don't know.

Mr. Hayden: Mark this "Defendant's Exhibit 1."

(Said page was marked by the reporter as "Defendant's Exhibit 1.")

Mr. Hayden:

Q. I show you page of a book that has been marked "Defendant's Exhibit 1," dated January 11th, 1921, and ask you in whose handwriting those entries on that page are?

Mr. Edwards: May I see it?

Mr. Hayden: Yes (handing book to counsel.)

The Witness: Mine.

Mr. Hayden:

Q. All of the writing on that page dated January 11th, Defendant's Exhibit 1, is in your handwriting?

A. I think so.

Q. Well, do you know whether it is or not? What is the fact; is it, or is it not?

A. Yes, sir.

Q. And you observe there that after the word "weather" is the word "rain"?

A. Yes, sir.

Q. Now, does that refresh your recollection as to whether or not it rained on the 11th day of January, 1921?

A. I do not remember; I couldn't say whether it did or not.

Q. But you wouldn't enter it in there unless it had rained would you?

A. I suppose not.

Mr. Hayden: Mark this page "Defendant's Exhibit 2."

(Said page was marked by the reporter as "Defendant's Exhibit 2.")

Mr. Hayden: Mark this page "Defendant's Exhibit 3."

[fol. 40] (Said page was marked by the reporter as "Defendant's Exhibit 3.")

Mr. Hayden:

Q. I show you two other pages in that same book, marked "Defendant's Exhibit 3 and 2," respectively, and ask you in whose handwriting those entries on those pages are, more particularly with reference to the weather?

A. Mine.

Q. And what was the state of the weather on the 12th?

A. Cloudy.

Q. And what was the state of the weather on the 13th?

A. Snow.

Q. Now, you say that on the night of the 12th you met this train that was due there going towards Newport at 6:41 in the evening?

A. Yes, sir.

Q. Do you remember whether that train was on time or not?

A. I don't remember whether it was on time or not.

Q. But, in any event, you met that train and received the mail from it?

A. Yes, sir.

Q. And then took the mail to the post office, did you?

A. Yes, sir.

Q. Who was with you that evening?

A. Miss Williamson.

Q. Her name at that time was Miss Fugett, was it?

A. Yes, sir.

Q. Did she accompany you to the post office with the mail?
A. Yes, sir.
Q. About how far was that from the station?
A. About a block.
Q. How is that?
A. About a block.
Q. And after you took the mail there you and she returned to the station?
A. Yes, sir.
Q. And went in the station?
A. Yes, sir.
[fol. 41] Q. And you were not out again that night?
A. No, sir.
Q. And at the time you went in the station, after you had been to the post office, there was no rain or snow or sleet anywhere around there, was there?
A. No, sir.
Q. Perfectly dry at that time?
A. Yes, sir.
Q. Can you give us about what time of night that was?
A. It was something like about 9 o'clock, I think.
Q. Do you remember about when it started to rain during the night?
A. Some time in the early part of the night.
Q. Well, about what time would that be?
A. To the best of my recollection, I think it was somewhere around 10 o'clock.
Q. You heard it rain, did you, while you were there in the station?
A. Yes, I knew it was raining.
Q. You knew it was raining just before you had gone to bed or just afterward?
A. Yes.
Q. Were you awake any during the night?
A. I don't remember.
Q. You don't remember whether you heard it sleeting or knew whether it was snowing or not during the night?
A. No.
Q. You were then in bed—you then got up along about 6 o'clock on the morning of the 13th, did you?
A. Yes.
Q. Did Miss Fugett get up at that time, too?
A. Yes.

Q. Who went out of the station first that morning?
A. I did.
Q. Where was she when you went out of the station?
A. She came behind me.
[fol. 42] Q. She followed you out?
A. Yes, sir; followed me out.
Q. And when you got out of there, what was the condition of these wooden steps leading from the waiting room?
A. I noticed nothing unusual around the wooden steps.
Q. Didn't notice any snow or——
A. Except the snow.
Q. Well, you saw snow on these steps?
A. Yes.
Q. And you say there were about two or three inches of snow around there?
A. Yes, sir.
Q. How far did that snow extend from the depot, as far as you could see?
A. Yes.
Q. Well, I say how far; was it all over the town there or was it just on the platform?
A. No; it was all over the town.
Q. All over the town?
A. I couldn't see it at that time.
Q. Well, I say, as far as you could see, could you see as far as the post office?
A. No.
Q. How far could you see?
A. Could only see a short ways.
Q. Well, you could see as far away as the railroad tracks, couldn't you?
A. Yes.
Q. And you could see that the entire width of the platform was covered with snow?
A. Yes.
Q. And that these two wooden steps were covered with snow?
A. Yes.
Q. Now, you stepped off you say, of the west end of the step?
A. Yes, sir.
Q. And went around to the west end of the depot?
A. Yes, sir.

Q. And as you did that you walked in the snow didn't you?

A. Yes.

[fol. 43] Q. Now, when you got around there you got the truck?

A. Yes, sir.

Q. And there was snow on the truck wasn't there?

A. Yes.

Q. There was also sleet on the truck, was there not?

A. I think so.

Q. You could see where it had rained and frozen on the truck before it snowed?

A. Yes.

Q. Now, did you move the truck alone?

A. No, sir.

Q. You took hold of it and pulled it?

A. Yes.

Q. And this other lady was at the rear end of it, pushing?

A. Yes, sir.

Q. And together you moved the truck from the west end of the depot north across the platform to some point somewhat west of the station?

A. Yes, west of the station.

Q. A total distance of about twenty-five feet?

A. Yes, sir.

Q. And, of course, during all that moving of the truck you were walking on the snow?

A. Yes, sir.

Q. That was on the platform?

A. Yes, sir.

Q. You could see that there was snow there, could you?

A. Yes, sir.

Q. Before you went out of the station did you light these two lamps in the station and the lantern?

A. Yes, sir.

Q. The lantern was loose so that anybody could carry it, wasn't it?

A. Yes.

Q. You could have carried it out on the platform if you wanted it out on the platform?

A. I couldn't handle the lantern and the truck both.

Q. But you could have taken the lantern out and set it on the truck?

A. Yes, sir.

[fol. 44] Mr. Edwards: May I hear that answer—what did you say, Miss Aeby, to the question before that?

The Witness: I said I couldn't handle it and the truck both.

Mr. Edwards: Oh, you couldn't handle it and the truck both.

Mr. Hayden:

Q. But you could have taken the lantern out and set it on the truck, couldn't you?

A. Yes.

Q. And you could have carried the lantern after you placed the truck while you were walking back towards the station?

A. I guess I could.

Q. In other words, that lantern was loose and could be carried around by you or anyone else?

A. Yes, sir.

Q. What was that lantern usually lighted for?

A. It was usually lighted to flag that Hot-Shot.

Q. That is the train that went through there in the night?

A. Yes, sir.

Q. Whenever anyone wanted to flag that train they flagged it with this lantern?

A. Yes, sir.

Q. Well, was the lantern lighted when you got up in the morning or did you light it?

A. The lantern was lit when I got up.

Q. Who lit it?

A. It was lit when I got up.

Q. Well, had it been lit from the night before?

A. Yes, sir.

Q. Who lit it?

A. I did.

Q. And it was burning or lighted all during the night?

A. Yes, sir.

Q. Now, you say at that time that there was no roof or extension out over the steps?

A. No, sir.

Q. Over those wooden steps?

A. No, sir.

[fol. 45] Mr. Hayden: Mark these "Exhibits 4, 5, 6, 7 and 8."

(Said papers were marked by the reporter as "Defendant's Exhibits 4, 5, 6, 7 and 8," respectively.)

JOHN C. MORRIT, being duly sworn, testified on behalf of plaintiff as follows:

Direct examination by Mr. Edwards:

I am a physician and have been for twenty-eight years. Am a graduate of the University of Maryland. Practiced two years in Baltimore and all the rest of the time in St. Louis. I am a general practitioner and practice surgery. I examined the plaintiff in this case this morning.

I examined her this morning about 9 o'clock, at my office. She had a flow of blood or show of blood, not a flow; very definitely blood was coming from the womb through the vagina, the privates, and then I made an examination of the pelvic organs; by that we mean the womb and the ovaries and the bladder and the rectum, those parts of the body contained in the pelvis or that portion of the trunk lying between the hips and below the abdomen. I could find no evidence of a right ovary. It would be impossible to tell from such an examination whether the appendix was removed or not. The left ovary and the tube was present. By the tube I mean the little duct which goes from the ovary to the womb. The ovary is the egg producing organ of the body, and the egg comes from the ovary; the ovum or egg comes from the ovary through the tube into the [fol. 46] womb, where it, if conception has taken place, develops into a child, and if conception has not taken place menstruation results. Now, the position of this womb was not at all normal. It was bent backward upon itself. The

normal position is forward, tilted slightly forward behind the bladder.

The Witness: Well, there was no evidence of the presence of any right ovary.

Mr. Edwards:

Q. Now, doctor, I wish you would explain to the jury what the uterus is and just how it is suspended?

A. The uterus is the womb; it is the organ in which the child develops from the ovum to maturity, to the time of birth, and, of course, it varies in size according to whether the woman is pregnant or not, and to the state of pregnancy. At full term it is large enough to hold a child or mass of ten or twelve po-nds. In the virgin, or before conception, it is about twice as big as the thumbs.

Q. How is that suspended?

A. The womb is suspended—it is rather loose in the abdomen. It goes up and down with breathing. A cough or sneeze will make a violent or rather active motion to the womb up and down. With the bladder full the womb is pushed backward, and with the bowel full it is pushed forward so that it is almost—it is about as free as most any organ in the body, has a wide range of movement—that is, about an area or radius of about two inches or three inches up and down, right and left, forward and backward, and it is limited somewhat by the ligaments which suspend it from the abdominal wall, from the front of the abdomen. There are two small ligaments about like that caliber (indicating); they are fibrous, rather tough, and the womb swings in and [fol. 47] is supported largely by those ligaments.

Q. Now, doctor, supposing a woman thirty-three years old, in previous good health, who had menstruated regularly every twenty-eight days, four days at a time, with normal flow, fell on ice, falling with her left arm doubled under her body, with her elbow against her waist line, caught herself with the left hand, throwing the weight of her body violently on her left arm, the elbow of which was pressed against the waist line; could such a fall and the subsequent jar cause uterine hemorrhage?

A. It could; yes, sir.

Q. Now, what is meant by hemorrhage of the uterus?

A. Hemorrhage of the uterus means bleeding from the womb, and it occurs physiologically or naturally in a single woman every twenty-eight days in the form of menstruation. Any other time except the regular menstruation is considered an abnormal flow of blood.

Q. Could such a fall cause injury to the ovary?

A. It could cause dislocation of the ovary, or what we call prolapse or misplacement of the ovary.

Q. What did you find, if anything, with reference to the lady's condition as to temperature?

A. I didn't take her temperature.

Q. You say you didn't?

A. No.

Q. You, say, as I understand it, you did find a noticeable, but slight bleeding of the womb this morning?

A. Yes, sir.

Q. Could you tell whether or not that was the natural flow during menstruation period?

A. There would be no way of telling that except from the patient.

Q. Except from herself?

A. No.

[fol. 48] Ida Aeby, being recalled, testified further as follows:

Redirect examination by Mr. Edwards:

Q. I wanted to ask you three or four questions that occurred to me before Mr. Hayden finishes the cross-examination. You have described this depression in front of the door. I will ask you to state whether or not that depression was there in practically the condition in which it was in January; whether or not that was there when you went to work there?

A. Yes, sir.

Q. Was that there before Superintendent Daniels came around?

A. Yes, sir.

Q. And when he was there?

A. Yes, sir.

Q. Now, did you have any charge of the repair of the platform?

A. No, sir.

Q. Who had charge of that?

A. The superintendent, roadmaster and section foreman.

Q. Were you told to do anything or order anything in connection with that?

A. No.

Q. Did the roadmaster or section foreman come along there after you went there?

A. Yes, sir.

Q. How frequently?

A. Well, the section foreman was there every few days, every day, most every day he passed there.

Q. And do you know whether or not it was his province to repair platforms?

A. Yes, sir; that is my understanding it was.

As the rain would fall, a part of it would run off and a part of it would soak in the chat. This chat was loose, so that it could soak down and in.

Q. Did you notice any slippery condition of the platform under the snow other than at this place where it had ac- [fol. 49] cumulated and frozen on that morning?

A. No, sir.

Q. Now, in this place where you say you fell, was that rough or even?

A. Rough.

Q. I want to ask you this question: Do you know whether or not you tripped on anything rough in this place?

A. Yes, sir.

Q. Well, did you?

A. Yes, sir.

Q. What do you know with reference to that?

A. Well, there was ice raised up in places that the ice had froze in places.

Q. Did you feel yourself catch on one of those?

A. Yes, sir.

Q. Well, as I understand it, previous to this, puddles had formed in front of the steps, but at that time it was not cold enough to freeze?

A. No, it wasn't.

Q. Now, what, if anything, happened to them?
A. Well, the water would gradu-lly run away.

Recross-examination by Mr. Hayden:

Q. You say that this depression or drain in front of the steps was about twelve inches deep?
A. Yes, sir.
Q. Did you ever measure it?
A. It was measured at one time.
Q. When was that?
A. It was measured after I got hurt.
Q. You don't know what the depth of it was then at the time you were injured or before?
A. I think it was about twelve inches at the time I was injured.
Q. That is your judgment about it?
A. Yes, sir.
Q. You never measured it before?
A. No, I never measured it.
[fol. 50] Q. You never measured the dimensions of any of this depression or drain along before you were hurt?
A. No.
Q. Now, you placed this truck out there at the north edge of the platform or near the track for the purpose of receiving any mail or express or baggage that might be destined for Magness on that westbound train, did you not?
A. Yes, sir.
Q. And after you placed the truck there you went back to the station?
A. Yes, sir.
Q. And it was while you were on your way after placing the truck there that you fell?
A. Yes, sir.
Q. Then, after that the train came along through there?
A. Yes, sir.
Q. And you went out again to the truck, did you?
A. I went out, yes.
Q. Did you get any mail or express off that train?
A. Miss Fugett did.
Q. There was mail or express put on this truck from that train, was there?
A. Yes, sir.

Q. And what was done with it?
A. Carried into the station.
Q. Who did?
A. Miss Fugett.
Q. How did she carry it in there?
A. Carried it in her hands.
Q. Did she move the truck up or was the truck left there?
A. The truck was left there.
Q. Now, she was also out on the platform there before the train came along?
A. Yes, sir.
Q. And after you put the truck in place?
A. Yes, sir.
Q. She was also on the platform before you moved the truck, wasn't she, on that morning?
A. Yes.
[fol. 51] Q. Did you see her out there?
A. She wasn't out only when we went to move the truck.
Q. You didn't see her there before?
A. No, sir; she was not.
Q. Didn't you see her out there sliding along or skating, as she calls it?
A. No, sir.
Q. And you didn't have any conversation with her about it being slippery out there?
A. I did not; not before.
Q. And you didn't see her do any sliding or skating or sliding along there?
A. No, sir.
Q. And you didn't do any yourself?
A. No, sir.
Q. Now, you say that as you walked along across that platform from where you placed the truck that you felt places raised along the ice?
A. In front of the door.
Q. How far out to the north from the door?
A. Just in front of the door.
Q. Well, how many of those places did you notice that your feet struck against?
A. Only in the ditch.
Q. Didn't you just say to Mr. Edwards you noticed a number of places as you were walking across there that you described as pieces of ice?

A. In the ditch?

Q. In the ditch?

A. Yes, sir.

Q. And this piece of ice was in the ditch in front of the doorway was about three or four feet long, you say, and about three or four feet wide?

A. Yes, sir.

Q. And was directly in front of the steps?

A. Yes, sir.

Q. It was snowing at the time you put the truck out there, wasn't it?

A. Yes, sir.

[fol. 52] Q. Now, what was the state of the weather that day later in the day?

A. Later in the day I think it cleared off.

Q. Stopped snowing?

A. Yes.

Q. Did it thaw?

A. Not to my recollection.

Q. How long did the snow and ice remain there after that?

A. I don't remember.

Q. Well, was it more than one day?

A. Yes, it was more than one day. I know it was at least three or four days.

Q. You didn't direct anybody to remove any of it, did you?

A. Yes, sir.

Q. Who did you direct to remove it?

A. I called twice to Sulphur Rock to the section foreman.

Q. That is Mr. Gruness?

A. Yes, sir.

Q. Did he come and remove any of it?

A. He did Saturday morning.

Q. But you had authority to direct anybody to remove any snow and ice that accumulated there?

A. No, I didn't have any authority to do that.

Q. I thought you telephoned him to do that?

A. I thought he should know it.

Q. You did it of your own accord?

A. Yes, sir.

Q. Had you ever requested him to remove anything of that kind from the depot platform before?

A. No, sir.

Q. That was the first time you ever asked him to do anything of that kind?

A. Yes, sir.

Q. When did you telephone him and ask him to remove this snow and ice?

A. What is it?

Q. When did you telephone him and ask him to come there and clean this snow and ice off the platform?

A. On Friday morning, the 14th, and again Saturday.

[fol. 53] Q. Now, the only way of lighting any building around there in Magness is by coal oil lamps, isn't it?

A. Yes, sir.

Q. There is no electric light or gas plant in that town?

A. No.

Q. And that was the only way of lighting this depot?

A. Yes.

Q. I show you a picture here that is marked "Defendant's Exhibit 4" for identification, and ask you whether, with the exception of the projection out over the steps and this rain door, or these plank in front of the steps, whether that is a fair representation of a part of the west end of the station and the platform as it was at that time?

A. Yes, sir.

Q. You notice in this picture the lamp that shows in the bay window there, do you?

A. We had a lamp that moved around.

Q. Doesn't that lamp set in a socket that was permanently fastened?

A. Yes, but we had a high lamp, a lamp that high (indicating).

Q. Wasn't that lamp there at that time?

A. No, sir.

Q. Wasn't it?

A. No, sir.

Q. Didn't have any lamp there at that time as shown in that picture?

A. No, sir; not at the time I got hurt.

Q. What kind of a lamp did you have in that ticket office or in that window?

A. I had an oil lamp that was up on a stand that we moved around.

Q. Now, I will show you one that has been marked "Defendant's Exhibit 5," and ask you if that correctly represents the conditions there at the time you were hurt, that is, with reference to the station and the platform, with the [fol. 54] exception of the roof over the doorway and the rain door or planks?

A. Yes, sir.

Q. I also show you picture marked "Defendant's Exhibit 6," taken from another position, and ask you if that correctly represents the tracks and the station with the exception of the roof over the doorway and the planks that are made there?

A. It doesn't show the drains.

Q. Well, it shows the depot and the platform and the tracks?

A. Yes, sir.

Q. It doesn't show any drain in that picture, you say?

A. No.

Q. The drain, you say, would be where that plank is laid?

A. Yes, sir.

Q. And the water that accumulated there in front of the door would run around the end of the station shown on this picture on the right-hand side of the picture as you are facing it, would it?

A. Yes.

Q. That is the right-hand end?

A. Yes.

Q. Out about the end of the planks or rain door that is laid there?

A. Right in here is where the door is.

Q. You are pointing in front of the steps and under this rain door or these planks, as they call them?

A. Yes.

Q. And this ditch ran off around that end of the doorway and off to the southwest, did it not?

A. Towards the west.

Q. Did you observe anything about how cold it was when you stepped out of the station that morning?

A. I knew it was cold; it was snowing.

Q. Well, did you know that it had frozen any during the night?

A. I found out after I stepped out.

[fol. 55] Q. I say, when you stepped out of the station?

A. The first I noticed of it was on the truck.

Q. Was on the truck?

A. Yes.

Q. And that was before you had fallen?

A. Yes, sir.

Q. And you could see then that the rain or water on the truck had frozen?

A. Yes, sir.

Q. And when you were on your way back you stepped on this ice and that caused you to fall?

A. Yes, sir.

Q. That was this piece of ice three or four feet long by three or four feet wide immediately in front of the steps?

A. Yes, sir.

I continued in the service there until the 21st of January, and then I was relieved by Mr. Eden. That is the man who had been the agent there before I went to work at Magness, but he had been away on leave of absence.

Q. You were some provoked that he came back and demanded his job back and was given his job, were you not?

A. I was not.

Q. Didn't you make several efforts to get the railroad company to allow you to have the job and to not give it back to him?

A. Yes, I did.

Q. And you claimed that you had been promised the job?

A. Yes.

Q. You objected to his being reinstated and given his job back, is not that right?

A. Yes, sir.

Q. Because, as you claimed, he had stayed beyond the leave of absence that he had been given?

A. Yes.

Q. You never reported to anybody between the 13th of January and the 21st, that is, anybody connected with the [fol. 56] railroad, that you had been injured?

A. Yes, sir.

Q. Who did you report that to?

A. Mr. Moxler, the morning I got hurt, the section foreman. I did not send word to Mr. Daniel because I thought probably that I would get better. I know a man by the name of Gibbons who was then located at Batesville. His position was that of agent. He was also local chairman of the Order of Railway Telegraphers.

Q. You appealed to him, didn't you, to intercede for you to hold this job?

A. I think I talked to him on the 19th.

Q. That is before you were relieved?

A. Yes.

Q. But after you knew Mr. Eden was coming back?

A. Yes. And Mr. Gibbons asked me to write Mr. Daniel about it; that is about all that was said, but he never took any action on my behalf at that time with reference to my getting this job. I did not belong to the order at that time. I think Mr. Eden did belong to it. I was given transportation by the defendant to go from Little Rock to Batesville and for some of the trips that I made after I came from the hospital to go back to Batesville and come from Batesville back to St. Louis. I was also given transportation to go up to Mayo Brothers Hospital at Rochester, Minnesota, in connection with my injuries. I was given transportation from St. Louis to Rochester, Minnesota, and return.

Q. And you knew before you started back after placing this truck, from the truck to the station, that it had sleeted and frozen and that there was ice around there, did you not?

A. I did not know the ice was before the door.

{fol. 57} Q. You knew that it had sleeted and frozen?

A. I knew it had sleeted and snowed, but I did not know the ice was before the door.

Q. You didn't know there was ice in this depression?

A. No, sir.

Q. But you knew that ice had formed elsewhere, didn't you?

A. No; I didn't notice anything unusual.

Q. You knew it had formed on the truck?

A. On the truck.

Q. You knew it had been cold enough to freeze?

A. Yes.

Q. And you knew, of course, if you stepped on this ice you might slip?

A. I didn't know there was ice there.

Q. Well, you know if you step on ice you are liable to slip, aren't you?

A. Yes.

Q. And did know it at that time?

A. I didn't know it.

Q. You didn't know that if you stepped on any ice that you were likely to slip?

A. Yes, I did know that.

Q. And whatever ice there was there had formed during the night between about 12 o'clock January 12th and 6 o'clock on the morning of January 13th?

A. It formed there during the night, but I don't know what time.

Q. Well, between those hours, didn't it?

A. I suppose so.

Q. How much do you say you were able to see when you went out on this platform?

A. It was very dark; you might see a person maybe ten feet from you.

[fol. 58] Q. Well, you could see clear across this platform from north to south, could you not?

A. No, sir.

Q. Didn't you say awhile ago that you could see out as far as the rails of the track?

A. Well, that was only about ten feet.

Q. You say it is only ten feet from the depot out to the tracks?

A. About ten or twelve feet is all it is, something like that.

Q. What is the length of that platform?

A. I don't know.

Q. Well, about how long?

A. It is probably the length of the block.

Q. And that platform, with the exception of the snow and ice, was in the same condition at that time that it was when you went to work there in July, 1920, wasn't it?

A. The ditch was still before the door; there was a ditch before the door when I went there; it was still there.

Q. And that ditch remained there all that time?

A. Yes, sir.

Q. And the platform in other respects, except as to the snow and ice, was in the same condition as it was when you went to work there in July, 1920?

A. Yes, sir; only with the usual wear.

Q. No; you don't understand my question.

Mr. Hayden: Read the question to her again.

(Question repeated by the reporter.)

The Witness: Yes, sir.

Redirect examination by Mr. Edwards:

I mean that the depression was twelve inches less than the highest portion of the platform near the rail. This de-
[fol. 59] pression was about four inches beneath the portion of the platform right around the depression.

Recross-examination by Mr. Hayden:

Witness identifies Defendant's Exhibit 9, written on both sides, and her signature thereto.

Thereupon, counsel for plaintiff read the deposition of WILLIAM B. LAWRENCE, taken at Batesville, Arkansas, which deposition is as follows:

DEPOSITION OF WILLIAM B. LAWRENCE

"I live at Batesville, Arkansas, and have practiced medicine since 1877. I am a graduate of the Jefferson Medical College of Philadelphia. I practice both medicine and surgery, more or less; just general practice. I know Miss Ida Aeby. I did not know that her name was Mary. I treated her in January, 1921. I first saw her at her father's home about five miles out in the country. I was physician and surgeon at that place for the Missouri Pacific Railway Company.

Q. When you were called to visit Miss Aeby state what you found her condition to be.

A. Her condition was a uterine hemorrhage.

Q. Did you find any external evidence of any injury of any sort at that time?

A. No, sir; I didn't. She didn't say anything to me about having any injury. I didn't examine her for any injury.

Q. Did you make any examination subsequent to that?

A. For what; for any injury?

Q. For anything at all.

A. I don't think I ever did.

Q. How long did you treat her?

A. I saw her three or four times. In a few days I took her to the hospital at Little Rock. I took her to Dr. Smith. [fol. 60] Q. To what hospital?

A. The Baptist Hospital, the railroad department.

Q. And Dr. Smith is a doctor for the Missouri Pacific Railway Company?

A. Yes, sir; he is the division surgeon at Little Rock.

Q. You took Miss Aeby to Little Rock personally?

A. Yes, sir; and her sister went along, too.

Q. During the period that you treated Miss Aeby here at Batesville did you find any injuries about her body?

A. No, sir; I didn't find any injuries at all. I didn't examine her especially for any injury. A day or two after I made the visit I asked Dr. Craig to go out with me, and something was said about an injury, but I didn't make any report of any injury because I wasn't informed about it.

Q. During the period that you treated her did you see any external evidence of any injury or any bruises?

A. No, sir; not any that I recollect.

Q. What would be some of the causes of a uterine rupture?

A. I didn't say anything about a uterine rupture. I said a uterine hemorrhage.

Q. Pardon me. What would be some of the things that would cause a uterine hemorrhage?

A. Well, we have uterine fibroids, sometimes, and sometimes a growth will cause it.

Q. A woman of Miss Aeby's age, that is, 34 years of age, what would be some of the causes of a uterine hemorrhage?

A. I don't know what was the cause of hers. I never did know what caused it.

Q. What would be some of the things that might cause it?

A. A cause might be fibroids of the womb; that might

cause it. It might be caused by a cancerous condition of the womb.

Q. In her case did you find any indication of a cancerous womb?

A. No, sir; I did not.

[fol. 61] Q. Suppose, doctor, that on the 13th day of January, 1921, Miss Aeby slipped and fell, falling to the ground with her left arm doubled under her body, with her elbow against her waist line, and caught herself with the left hand, throwing the weight of her body violently on her left arm, the elbow of which was pressed against the waist line; now, could a fall of that sort and the subsequent jar cause a uterine hemorrhage?''

Mr. Hayden: I will withdraw the objection.

Mr. Edwards (reading): ''—cause a uterine hemorrhage?

A. It would be impossible for me to say. I never saw anything of the kind. I would be more apt to look for an injury elsewhere, or for broken bones.

Q. Would you say that a fall such as I have described couldn't possibly cause that?

A. No, sir; I would not say so. It might possibly, but it didn't occur to me——

Q. What, in your opinion, doctor, was the cause of this uterine hemorrhage?

A. I don't know. I could't tell you that.

Q. I will ask you if you saw any external evidence of any injury to the body of Miss Aeby which would cause this condition?

A. No, sir.

Q. Have you any records of the history of the case?

A. Very little. I only saw her a few times. I took her down to Little Rock and then I understood that she went from there to St. Louis.

Q. When did you take her to Little Rock?

A. I don't recall.

Q. Have you made any examination of Miss Aeby since you took her to Little Rock?

[fol. 62] A. I don't recall. I might have seen her at her home a few times. I might have seen her and talked to her.

I believe that I saw her at Mrs. McGuire's home and gave her some medicine, as I understood that the hemorrhages continued after she came back from Little Rock.

Q. And you say that you don't know whether such a fall as I have described could cause such a hemorrhage or not?

A. I don't know whether a fall could have caused that or not, but it didn't seem hardly possible."

Cross-examination by Mr. Hayden:

Some member of the family at her father's house called me to visit Miss Aeby.

Q. Did she give you any history of the case at that time?

A. I don't think that she did that day. I took Dr. Craig out later. He had been in the family more than I had. It was the next day or the second day after that. I don't remember whether I went to see her three or four times, but I know I went several times and then it was agreed that I should take her to the hospital.

Q. Nothing was said during your first visit about her getting hurt?

A. I don't remember that she did. I know that I did not make any such report, which I should have done if she had mentioned it to me.

Q. When you went there after that, did she say anything about being injured?

A. Yes, sir. My understanding was that she said she had fallen. I understood her to say that she had fallen on skates. I haven't any written data on it. I did not write anything down.

[fol. 63] Q. Did she say she had fallen on skates or while skating?

A. I don't know just the words, but I inferred that she was on skates. I inferred that she was skating, rather, or she wouldn't have been on skates.

Redirect examination by Mr. Edwards:

The hospital at Little Rock is a Missouri Pacific hospital. I took her there at my own request. I suppose, Mr. Daniel, the superintendent, issued the transportation. I have been paid for the service which I rendered Miss Aeby. The

Missouri Pacific Railway Company paid me. I think it was paid through the Hospital Department. Dr. Craig was present when she made the statement about being on skates, but I do not know whether he was right in the room at the time and heard it or not. I do not know whether any members of Miss Aeby's family were present when she made that statement. It is very likely that they were. I think some member of the family was always present there in the room. I think this statement was made in the forenoon.

Q. You wouldn't say positively whether she said that she had fallen while skating or while on skates?

A. That is my recollection. The first time that I visited Miss Aeby, she was conscious. I don't remember seeing her when she was unconscious.

Recross-examination by Mr. Hayden:

It was my understanding that she was an employe of the Missouri Pacific Railroad Company and I treated her and acted accordingly.

[fol. 64] Deposition of Mrs. E. R. McGuire Read on Behalf of Plaintiff

I live at Batesville, Arkansas. Am a sister of the plaintiff. Prior to January 13, 1921, my sister and I did not live together. From 1912 until January, 1921, except for a period of nine months, when my sister was in Texas, I saw her every week or so. I think she went to Texas in 1913 in the summer. Just prior to January 13, 1921, I saw her sometimes every few days or maybe it would be a week or two weeks. I know the condition of her health during that period. I think her condition was pretty well. She was working all the time. I know that she did not have any illness. She was not even treated by any physician. Most of the time since January 13, 1921, she has lived at my home except when she was in the hospital. She was with me two weeks after Dr. Lawrence brought her to mother's before he sent her to Little Rock. That was in February, 1921, I think. I saw her January 19th. She came to my house from Magness. At that time I observed

her physical condition. It was a uterine hemorrhage, and her left hand was swollen and all up on her arm. There were no cuts or abrasions, just a skinned place on the palm of her hand. She had the hemorrhage at that time. She did not call a doctor then. I next saw her on the 24th of January, 1921. I went after her at Morefield and brought her to my house in Batesville. She had a very bad hemorrhage on January 24th. There was no other condition that I observed at that time. She did not consult a physician at that time. She stayed at my house the night of the 24th and I carried her out to mother's the next day. I did not stay with her after I took her out to my mother's. That [fol. 65] was on Monday, the 24th, and I am not sure but I think it was Wednesday that they called me over the phone. I saw her that Wednesday. She was in very bad condition. She had had such awful hemorrhages that she could not hardly talk. I was not present when Dr. Lawrence and Dr. Craig examined her at my mother's home. She resides with me a part of the time now since she came back to St. Louis. I suppose that has been a couple of months. I have observed her physical condition since she has been living with me. She complains all the time about her shoulder and back. That is, the left shoulder. I visited my sister at Magness, Arkansas, when she was station agent there. I spent the night down there with her on one occasion. I think I drove down there a couple of times. I know where the railway station at Magness is. I have seen it just what times I have been down there.

(Witness identifies Plaintiff's Exhibit A as a picture of the station at Magness.)

I made that picture. I do not know just exactly when it was, but it was the day the platform was measured. I suppose it was in the fall of 1922. I used a No. 2-A Buster Brown. I also made the picture marked "Plaintiff's Exhibit B" at the same time. I also took the picture marked "Plaintiff's Exhibit C" on the same occasion.

Mr. Edwards: Now, then, these three pictures are attached to the depositions as Plaintiff's Exhibit A, B and C, and I will now offer them in evidence, and, if you please, I will keep on reading the deposition and pass them around

[fol. 66] to you at one time because they are hooked on to it.

(Said exhibits appear hereinafter at pages 84-85.)

Plaintiff's Exhibit A is the front of the station. When I took that picture I was standing on the railroad, I think, right in front of the station. I saw this station prior to January 13, 1921. This building shown in this picture is the same building as the one that was there in 1921, but this shed over the door marked with an "X" on the picture marked "Exhibit A" wasn't there when I visited my sister down there. The end of the building is shown in Plaintiff's Exhibit B. I think the front of the station faces north. I am not positive about that, but I think so. Assuming that the front of the building faces north, this is a picture of the west end on the side of the platform. I don't think the planks marked "X" in Plaintiff's Exhibit B were there in 1921. I don't have any recollection of those planks being there. I know that was the first two things that I noticed when I went there to make a picture of the station.

Referring to Plaintiff's Exhibit C, the track marked "X" is the same track that was there at the station at Magness when I visited there prior to January, 1921. When I visited the station prior to January, 1921, I saw the station platform, but I didn't pay no particular attention to the platform or out on the platform, which was constructed of gravel. It sloped. I suppose it sloped to the south, the way the drain was from the door. I suppose it came around this way from the door and sloped to the end of the station. It didn't slope much right in front of the station. It sloped [fol. 67] from the door and around to the west end. It sloped around that way. When I visited there prior to January, 1921, it sloped from the door around this way. I could show you better on this picture.

Referring to Plaintiff's Exhibit B, the slope runs from the steps shown on the picture and passes the corner of the building shown on the picture and past the side of the picture. I spent one night there. At that time the station house was lighted with a lamp. I don't think that we had but one lamp and a lantern. I would not be positive whether there was a lamp lit in the waiting room or not.

I think there was a light in the waiting room, but I would not be right positive whether it was a lamp or a lantern.

Cross-examination by Mr. Hayden:

I don't know just when the trains were due there at that time. I think these pictures, Exhibits A, B and C, were taken in the early fall of 1922. The shed over the door is the part of the station as shown by Exhibit A. That has been built since my sister was here. By shed, I mean that roof. I suppose that a roof and a shed would be the same thing. I do not remember about these planks. I am most certain that they were not there when I visited down there. I cannot recall the date when I visited there. I know it was some time when sister was staying in the station. She was living in the station at the time she was injured. I cannot tell whether I visited there a month or two months before she was injured. It was cold weather. We had a fire in the station. I do not know how long she worked at this station before she was hurt. I do not think [fol. 68] it was as much as a year. Before that she worked as station agent at Morefield. I do not know how long that was. She also worked at a store at Morefield. Morefield is west of Magness, between Magness and Batesville.

Referring to Plaintiff's Exhibit B, I was standing west of the station when I took that picture. The extreme point shown in this picture is not the point from which I took it. I do not know how far south of the front of the building I was when I took it. The picture includes nearly half of the end of the station.

Referring to this picture again, the platform sloped from this door around on the west side, or I suppose you would call it south. It slopes to the south on the west end of the station beginning at a point about the end of the planks back right in front of the door. The slope starts near the drain of the house. I am not positive whether that drain is two or three feet out from the wall of the station. I couldn't say. I think they put the planks over the drain. The slope starts about the end of the planks out as far as where that cross mark is. I could not say whether that portion of the platform between the cross mark and the track slopes. The first time I saw my sister after she was

hurt was on the 19th day of January. I then saw her in Batesville. From the 19th until the 24th of January she was at Magness. She came up on business on the 19th. She did not come to see the doctor. She came up on other business and went back to Magness on the 19th and remained there until the 24th. She came back to Batesville on the 24th and on that day I took her out to my mother's. I do not know just exactly when she went to Little Rock. [fol. 69] She was at my house something near two weeks after she had gone to Little Rock. She stayed at my mother's until in June. She stayed either in Batesville or at my mother's until June, 1921, then she went to St. Louis. After she was in the hospital at St. Louis she came back to Batesville. Then she went back to St. Louis to the hospital, and after she left the hospital the last time she came back to Batesville. That was in 1922. That was before I took these pictures. When she went back to St. Louis she did not go to the hospital. I do not know where she was the last time she was in St. Louis nor how long she was there. She worked there last winter at Smith & Daniels Clothing. I wrote her while she was in St. Louis. I sent my letters to the Y. W. part of the time and to the Statler Hotel part of the time. I do not know how long she worked in St. Louis. She went back in the fall of 1922 and stayed there all winter. She has been back to Batesville about two months, I guess. She was in St. Louis all of last winter. I think she went there in November. On that occasion she was there six or seven months. I do not know whether she was treated by any doctor while she was there that time. I do not know how long she worked for this Smith & Davis Clothing Company. I know this truck shown in the picture marked "Exhibit C" is the same truck that was there when my sister worked there because it looks like it. I cannot tell how I know it, but I know that it is the same truck. There is a wheelbarrow shown in the same picture. We intended to move that, but did not. I don't know whether that was the same wheelbarrow that was there before she was hurt. I placed that truck there at [fol. 70] the end of the station. I pulled it up a little. It was on the south side near the west end. I took it and pulled it out so it was right against the wall of the station

so it would show in the picture. I have seen other trucks on that order here in Batesville.

Q. And you are able to tell out of all the trucks that you ever saw that this is the same truck?

A. Well, I am not certain, but I think it is.

Q. You moved it alone?

A. Yes, sir.

Q. Who was with you at that time?

A. My sister and my nephew and Mr. Reynolds. He is a carpenter there. He lives in Batesville. Four of us were present when these pictures were taken. When I took the truck around I brought it around this telegraph pole. There is not space enough to pull the truck through between the telegraph pole and the station.

Redirect examination by Mr. Edwards:

My sister, the plaintiff, was with me when these pictures were taken. I went with her to Little Rock when she went to the hospital in 1921. My husband and Dr. Lawrence went with us. We took her to the Baptist Hospital at Little Rock.

Ida Aeby, recalled, testified as follows:

Further recross-examination by Mr. Hayden:

Q. You testified yesterday that you were station agent at this station from July, 1920, until January, 1921?

A. Yes, sir.

Q. And that this ditch or depression in front of the sta- [fol. 71] tion was there during all of that time?

A. Practically; yes.

Q. Well, when did it form there?

A. Well, it would naturally wear more and more all the time.

Q. Well, was there any of it there when you went to work there in July?

A. Yes; water run before the door.

Q. About what was the size of it at the time you went to work there?

A. Well, it wasn't as deep at the time when I went to work there as at the time I got hurt.

Q. That is not what I asked you. What was the size of it at the time you went to work there?

A. It was from two to three inches deep.

Q. In July, 1920, it was about two or three inches deep. Was it the same length and width that it was at the time you were hurt?

A. No.

Q. About what was the length and width of it in July, 1920?

A. It gradually sloped off; the water run to the west end.

Q. Well, about how wide was it in July, 1920?

A. About two feet.

Q. And about how long?

A. About four feet.

Q. And from July, 1920, until January, 1921, it got wider and deeper?

A. Yes.

Q. For how long prior to January 13th, 1921, had it been the same size that it was on the 13th of January, 1921.

A. Well, it wore out the last month; of course, the more rain it would wear out deeper, and the passengers going out the door; maybe a month.

Q. Well, it was constantly wearing until it was larger, wider, longer and deeper?

A. Yes, sir.

[fol. 72] Q. How long had it been approximately the same size that it was when you were hurt?

A. The rain, I think, had washed it out some that night.

Q. The rain washed it out the night before you were hurt?

A. I think so, some; I think it washed it deeper that night.

Q. So that on the 12th of January it was not as long or as wide or as deep as it was on the 13th?

A. Maybe not so much.

Q. Well, about what was the size of it on the 12th, the day before you were hurt?

A. Well, maybe it was about two or three inches deep.

Q. About two or three inches deep?

A. Yes.

Q. And about what was the width of it?

A. About three feet.

Q. And it was three feet wide on the 11th, was it?

A. Something like that.

Q. And the same on the 10th?

A. Probably so.

Q. And for several days prior to January 13th it had been practically three feet wide?

A. Yes.

Q. Now, did you place this truck out for this morning train every morning?

A. Yes, sir; every morning that I was at the station.

Q. And that had been true during all the time that you were working there?

A. Excepting what time I was relieved.

Q. I mean every time you were working and on duty you met this morning train every morning?

A. Yes, sir.

Q. The train due there at 6:18, known as No. 214?

A. Yes, sir.

Q. And moved this truck out to the north edge of the platform next to the tracks?

A. Yes, sir.

[fol. 73] Q. Before the train arrived?

A. Yes, sir.

Q. In order to receive any mail or express or baggage off of that train?

A. Yes, sir.

Q. You would move it out there and then go back to the station and wait for the train?

A. Yes, sir.

Q. You did that every morning that you moved the truck?

A. Yes, sir.

Q. And, of course, every morning when you would go back from the truck to the station you had to step over this ditch or drain, didn't you?

A. Yes, sir.

Q. And the same conditions, with reference to light around that station, had existed there during all the time that you worked there as existed on the morning of the 13th of January, 1921?

A. Yes, sir.

Q. There never were any other lights there than what you had that morning while you worked there?

A. No.

Q. Did you ever step in any water that was in this drain at any time when it rained before that?

A. A person could usually step over the water.

Q. Well, you saw water in the drain then, did you?

A. Yes, I saw water in the drain.

Q. And on occasions when there was water in the drain you stepped across it onto the steps?

A. Yes, sir.

Q. That is onto the wooden steps?

A. Yes, sir.

Miss Fugett, the lady that is no/ Mrs. Williamson, stayed there with me the night before this accident. I had known her—been with her practically all the time that I was at Magness. I had known the family all my life. She was a friend of mine. She now lives at Fort Worth, Texas. I think I wrote her two or three letters since she left there and she has written me some. On the morning that I was hurt she and I moved the truck out to the north edge of the plat- [fol. 74] form and then she went in ahead of me to the station and she was in the waiting room of the station when I fell.

Q. In which direction were you walking at the time you fell?

A. I was walking south towards the station.

Q. Walking south from where you had placed the truck towards the entrance to the station?

A. Yes, sir.

Q. And as you came along to this trench or ditch or drain or whatever you call it, you stepped on that and your foot slipped?

A. Yes, sir.

Q. Slipped on the ice that had formed there during the night before?

A. Yes, sir.

Q. And that was there at that time?

A. Yes, sir.

Q. And that was what caused you to fall?

A. Yes, sir.

Q. And you were in sole charge of that depot during all the time that you worked there, weren't you?

A. Yes, especially the office. I had nothing to do with the platform.

Mr. Edwards:

Q. Had nothing to do with what?

A. Nothing to do with repairing the platform.

Mr. Hayden:

Q. You were in charge of whatever work went on around there?

A. Yes, sir.

Q. If it was necessary to employ any men to unload cars you employed them, didn't you?

A. Not to unload cars; no, sir.

Q. But you certified to their time?

A. To load cars; to load cotton.

Q. To load cotton?

A. Yes, sir.

Q. Well, who employed those men?

A. I did.

[fol. 75] Q. I will ask you if Mr. Daniels didn't tell you some time prior to this accident that you were in sole charge of that station?

A. He told me that I had to hire Mr. Garner, was all.

Q. You had some conversation with him about this man Puckett that worked there as helper before Garner, didn't you?

A. Yes, sir.

Q. And stated to Mr. Daniels something to the effect that Puckett's services were not satisfactory?

A. Yes.

Q. And he told you that you were in sole charge of that; if Puckett's work was not satisfactory to discharge him and get someone whose services would be satisfactory?

A. Yes.

Q. Thereupon you discharged Puckett?

A. Yes, sir.

Q. And hired Garner?

A. Yes, sir. Mr. Daniels' orders.

Q. You never notified Mr. Daniels anything about the condition of this platform, did you?

A. No.

Q. Where did Mr. Daniels live at that time?

A. Aurora, Missouri.

Q. About how far was that from Magness?

A. I don't know just how many miles it was.

Q. Well, can't you give us some idea?

A. Probably one hundred or one hundred and fifty miles. I don't remember.

Q. Now, you also met the night train at 6:41 at that time?

A. Yes, sir.

Q. Did you take the truck out to that train?

A. Yes, sir.

Q. At that time of the year it was darker, 6:41 in the evening, than it was at 6:18 in the morning, wasn't it?

A. Yes.

I think that is all.

[fol. 76] Redirect examination by Mr. Edwards:

Q. Who was the section foreman?

A. Mr. Gruness was the section foreman.

Q. What were his duties?

A. He prepared around the stations—did the work around the stations.

Q. How often did Mr. Gruness come there?

A. Mr. Gruness was there—maybe it would be three or four days during the week and maybe again he would be there every day for a week; come by there.

Q. How long was a section?

A. I think a section was about five miles.

Q. Five miles. I think you said yesterday that a day or two after the fall you told Mr. Gruness about it?

A. Yes.

Q. Now, then, whatever repairs were made on the platform, if any were made, who made them?

A. The section man.

Q. Under the section foreman?

A. Yes, sir.

Q. Did you give this foreman or did the section foreman give those orders?

A. I did not give no orders.

Q. Do you know whether the section foreman looked after that?

A. He was supposed to, yes.

Q. He was there, you say, sometimes at least once a week?

A. Yes.

Q. And a section is only five miles long?

A. Yes, sir.

Q. Now, with reference to this fall, did you speak to Mr. or Mrs. Williamson about it after the fall?

A. Mrs. Williamson was with me at the time, yes.

Q. Oh, yes, that is right; I get you. Mrs. Sherman, did you speak to her?

A. Yes, sir.

Q. How long after the fall?

A. Same day.

[fol. 77] Q. Now, you described yesterday afternoon before we adjourned about your falling in this place that you have talked about. I wish you would state, if you know, upon what you caught your foot, if you caught your foot on anything?

A. In the ice, rought ice.

Q. Did you get caught on those rough pieces?

A. Yes, sir.

Q. Now, was this all covered with snow?

A. Yes, sir.

Q. Did you have any braces made after you were injured?

A. Yes, sir.

Q. At whose instance did you have these made?

A. Dr. Vasterling.

Q. Where is Dr. Vasterling?

A. Missouri Pacific Hospital.

Q. How long after you went to Dr. Vasterling at the Missouri Pacific Hospital did he order these braces?

A. I went there in June. He ordered these braces in November.

Q. Now, I have some braces in my hands. Are these the braces that Dr. Vasterling in the Missouri Pacific Hospital ordered you to have made and wear?

A. Yes, sir.

Q. Did you wear them?

A. Yes, sir.

Q. For how long?

A. Several months.

Q. You have told the jury, as I recall it, you were in the hospital from the 12th of June to the 5th of September of the following year, about fifteen months?

A. Yes.

Q. Dr. Vasterling, was he in the hospital at the Missouri Pacific from the time you entered until the time you left?

A. Yes, sir.

Q. Still is there, is he?

A. Yes, sir.

That is all.

[fol. 78] Recross-examination by Mr. Hayden:

Dr. Vasterling personally ordered the braces. I had a conversation with him about that at the time they were ordered and he got them for me and directed me to wear them. This section foreman, Gruness, had a section there about five miles long. When any work was done around the depot, he came there and directed his men to do it.

Q. And if there was anything that was required to be done there that was to be done by him, you notified him to do it, didn't you?

A. I never ordered him to do anything excepting the time I asked him to move the snow off the platform after I was injured.

Q. You mean you asked him to clean this snow off the day after you were hurt?

A. Yes, sir.

Q. But you had authority to ask him to do any kind of work of that kind?

A. I asked him to do that, yes.

Q. That is not what I asked you. You had authority to ask him to do any work around the station there, that is, that was within his duties?

A. I had no authority that I know of to do that.

Q. Well, you did do it, didn't you?

A. I did do it, yes.

Q. If there was anything there to be done that was in his department, you notified him that it was to be done?

A. I did that one time.

Q. Well, the time of moving the stove and the time of cleaning the snow off.

Mr. Edwards: Maybe I misunderstood. I didn't hear anything about moving a stove.

Mr. Hayden:

Q. Didn't you say anything about a stove?

A. No, sir.

[fol. 79] Q. Just about the snow?

A. Snow.

Q. Didn't you testify yesterday that you had authority if there was anything to be done around the depot, to notify either Mr. Daniels or Mr. Gruness or the roadmaster?

A. I don't think I did.

Q. Well, what is the fact about that?

A. I said they had charge of those things. I was working under Mr. Daniels' order, and Mr. Daniels, the roadmaster, and the section foreman had charge of the road. I had nothing at all to do with the road or the platform.

Q. I don't care anything about the road; I am talking about the depot and the platform.

Mr. Edwards: She just said, or the platform.

Mr. Hayden: I don't care anything about the road; I know she didn't have anything to do with the railroad.

The Witness: I had nothing to do with the platform.

Mr. Hayden:

Q. Suppose anything arose while you were there that required repairs, how would they know to repair it unless you told them?

A. I would usually tell them.

Q. Certainly; that is what I am asking you. And whenever there was anything arose that required any repairs or attending to you notified one of those three men?

A. Yes.

Q. But you never notified any one of them about this ditch or drain in front of the door, did you?

A. No, sir.

That is all.

Mr. Edwards: That is all.

[fol. 80] WILLIAM E. LEIGHTON, being duly sworn, testified on behalf of plaintiff as follows:

I am 51 years of age. Have been a practicing physician since 1900 and in St. Louis since 1904. I practice both as physician and surgeon. Am a graduate of Harvard Medical School. Plaintiff consulted me on May 2, 1921. I made a physical examination of her at that time.

Q. Please tell the Court, the gentlemen of the jury and counsel, Mr. Hayden, what you found?

A. The principal thing that I found at that time was a backward displacement of the uterus.

Q. And the uterus is the womb, is it?

A. Yes, sir.

Q. Did that cause hemorrhage of the womb?

A. Not at that time.

Q. But there was displacement there?

A. Yes, sir.

Q. Now, doctor, supposing a woman 33 years old, this plaintiff, with previous good health, had menstruated regularly every twenty-eight days with a normal flow, fell on ice, falling with her left arm doubled under her body, with her elbow against her waist line, and caught herself with the left hand, throwing the weight of her body violently on her left arm, the elbow of which was pressed against the waist line, could such a fall and the subsequent jar cause displacement of the womb?

Mr. Hayden: Wait a moment, we object to that.

Mr. Edwards:

Q. In your opinion?

Mr. Hayden: Object to that as invading the province of the jury, incompetent, irrelevant and immaterial.

[fol. 81] The Court: Overrule the objection.

To which ruling of the Court defendant then and there duly excepted and still continues to except.

The Witness: Falls are given in authoritative works as a cause of uterine displacement.

Mr. Edwards:

Q. Could such a fall as I have described and such conditions cause hemorrhage of the uterus?

A. Yes, sir; they will sometimes follow, too.

That is all.

Mr. Hayden: That is all.

DEPOSITION OF DR. FRANK A. GRAY, TAKEN ON BEHALF OF PLAINTIFF

DR. FRANK A. GRAY, being duly sworn, testified on behalf of plaintiff as follows:

Direct examination by Mr. Vogel:

I am 45 years of age; reside at Batesville, Arkansas; have been practicing medicine for twenty years. I examined Miss Aeby for an insurance policy during the year 1919. She passed that examination for insurance.

Cross-examination by Mr. Hayden:

My examination was a general physical examination that we generally make for life insurance. I examined her for the Jefferson Standard Life Insurance Company. I do not know where that company is located. I sent my report [fol. 82] to the company, but I do not remember where that was

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DEPOSITION OF DR. R. C. DORR, TAKEN ON BEHALF OF PLAINTIFF AT BATESVILLE, ARKANSAS

DR. R. C. DORR, being duly sworn, testified on behalf of plaintiff as follows:

Direct examination by Mr. Vogel:

I live at Batesville, Arkansas. Have been practicing medicine for forty years. Am a graduate of the Missouri Medical, which has been made a part of the Washington University. I do general practice. I do more surgery than

anything else at the present time. The records show that I examined the plaintiff in 1921. The record shows that I made the examination on September 3, 1921. I did not make a record of what my examination showed, but I guess I could find a history of the case. The left shoulder was injured. She says I examined her twice since then. I would have to guess at what day and month it was. I know that it was here in town that I made the first examination.

Q. Suppose, doctor, that on January 13th, 1921, this woman slipped and fell with her left hand doubled under her left side with her elbow in her waist-line, and fell and hit violently upon her left side, throwing the weight of her body upon her left arm. Could a fall like that cause a misplacement of the uterus?

A. A fall could cause a misplacement, but, of course, I couldn't testify that a fall caused her misplacement. I would say that a fall could cause a misplacement of the uterus.

[fol. 83] DEPOSITION OF A. J. SHERMAN, TAKEN ON BEHALF OF PLAINTIFF AT MAGNESS, ARKANSAS

A. J. SHERMAN, being duly sworn, testified on behalf of plaintiff as follows:

Direct examination by Mr. Vogel:

I live at Magness, Independence County, Arkansas. I am 59 years of age. I am in the mercantile business at Magness. I lived at Magness on January 13, 1921, and prior to that time. Prior to January 13, 1921, she boarded with me here in Magness. I do not recall how long she was here. She came here from the time she took charge of the station. I do not know exactly, but she was here a good long while. She was not boarding at my house on January 13, 1921; she was staying at the station, then. My store is about thirty or thirty-five yards pretty near west and a little north of the station at Magness. It was the closest house to the station. I have seen the station at Magness very often and am familiar with its location and structure and with the location and structure of the station platform. I am on it every day. The platform is just a

chat-covered platform on the ground. The platform sloped at that time. It sloped off to the northwest like, coming around from the door the drainage from the house came kind of off this way to the northwest. I could not tell as to just how much slope that was. It is not a great deal of slope, but I have seen the water run off there. It is just kind of wore out there. There is a cover up over the steps there now that Mr. Eden put up. It was not there when [fol. 84] this lady was there, and he put a grain door there. I have seen the station at Magness when it was snowing or in rainy weather. After a rain water would stand in puddles in front of the door of the station. I don't know just how wide the puddles would be, but it wouldn't be a very wide place. When snow melted on the roof of the station house water would drip down there and form an ice in cold weather. In cold weather this water would form puddles of ice in front of the station around this way. I think there was snow or sleet here on the 13th of January, 1921. I do not remember exactly, but I think it was kind of snowing and sleeting together. I see the station at Magness frequently at night. It is lighted by a lamp in the northwest corner of the house in the waiting room. Just one lamp. Sometimes they have a lantern, but it is not usually lighted until they get ready to leave, and then they leave it there by the window. It is left there to flag the Hot Shot with. That's what they tell me and that's what we use it for. That is not a regular stop for the Hot Shot. The Hot Shot is a passenger train that is due here at 9 o'clock and goes back to Newport in the morning. I have been running a store in the present location seven years. I am at the station most every time the morning and evening trains come through, or the local from Batesville to Newport. The truck at the station is brought up to load and unload the mail and express on those trains. It is used most every day. I don't guess it would miss a day in a month. I never did notice it not being used any time. It would be mighty seldom that it wouldn't be used.

Q. During the period that Miss Aeby boarded and [fol. 85] roomed with you, did you observe her physical condition, her health?

A. Yes, sir——

Mr. Hayden: I object to all that answer after the word "Yes, sir," as being a conclusion of the witness, not shown to be an expert.

The Court: Overrule the objection.

To which ruling of the Court defendant then and there duly excepted and still continues to except.

Mr. Edwards (continuing reading):

Q. During the period that Miss Aeby boarded and roomed with you, did you observe her physical condition, her health?

A. Yes, sir; I considered it all right. I never noticed her being sick or taking any medicine.

I never did see her take a dose of medicine when she was here. I don't say that she never did take a dose, but I didn't see her. She performed her duties at the station every day. I don't know anything about her being hurt at the station at Magness on the 13th of January, 1921, of my own observation. During the month of January, 1921 I did not observe any injuries on Miss Aeby.

Cross-examination by Mr. Hayden:

She and I never had any conversation about it. I kept my store open in the evenings until after night awhile. At during the fall we generally keep open until the Hot Shot runs. That was the rule in 1921, when Miss Aeby was hurt. We light our store with coal oil lights. That is the only kind of lights we have in this town. We have no gas or electric lights. We just use coal-oil lamps. J. B. Garner is my son in law. That is the gentleman that used to work around the station there. He has been station [fol. 86] agent and helper at the station.

Deposition of Henry H. Stuber, Taken at Magness on Behalf of Plaintiff

Henry Holmes Stuber, being duly sworn, testified on behalf of plaintiff as follows:

Direct examination by Mr. Vogel:

I am 22 years of age. I reside about a mile from Magness, between Magness and Newark. I have lived there a little over a year. I am a farmer. In January, 1921, I live

at Magness. I was familiar with the structure and location of the Missouri Pacific Railway station in Magness in 1921 and with the structure of the station platform at that time.

Q. What kind of a platform was it?

A. Well, it was a tolerable good platform. Down next to the depot, of course, the rain had washed a trench around the door. The platform was made of chat. Really I don't know whether it was level or sloped in front of the depot. The rain had washed it where it run around. I have been at the station a number of times when it rained or snowed. When it rained the water would stand in puddles in front of the door. These puddles were not very large. I have been there during freezing weather. I have seen water frozen in puddles in front of the station door. I could not say for sure whether I was in the station during the nighttime in the month of January, 1921. The station was lighted with one light, a coal-oil light, which was kept in [fol. 87] the southwest corner. I have seen a lantern around the station. I have seen that lantern lit in the nighttime. It was kept setting on the ticket window.

DEPOSITION OF MRS. KATIE SHERMAN, TAKEN AT MAGNESS ON BEHALF OF PLAINTIFF

MRS. KATIE SHERMAN, being duly sworn, testified on behalf of plaintiff as follows:

Direct examination by Mr. Vogel:

I live at Magness, Arkansas. Have lived there seven years. I am 52 years of age. I know the plaintiff. I recall when she was agent at Magness in 1920 and 1921. At that time she roomed and *and* boarded with me. She came here, I think, in August. She stayed with me a little better than five months. She was not rooming with me on January 13, 1921. During the time that she stayed with me I observed her physical condition and her health. She seemed well all the time. She never took any medicine that I know of. She worked every day. On or about January 13, 1921, Miss Aeby complained to me of an injury. She first complained on the 13th. I saw her on that day at the station.

Q. What did she say was the nature of her injury?

A. Well, I don't know that I can hardly tell. Of course, she was hurt in her shoulder some way, or in her side. I don't think that I could recall positively which shoulder it was.

Q. Did you see any external evidence of the injury—any bruises or cuts?

A. Nothing only her hand. I don't know that I can re- [fol. 88] call which hand it was. I don't remember seeing that on that day. I don't know when I saw that. It might have been the next day; I couldn't say for sure. I suppose I saw her every day for the days following January 13, 1921.

Q. During the days following January 13, 1921, did you notice any injuries to Miss Aeby?

A. I know that she complained after that, and that her hand was swollen. I think it was her left hand, but I would not say for sure.

Q. Did she complain to you of any other injuries?

A. Nothing only about the fall.

Q. To your knowledge, was she treated by any doctor during that period?

A. No, sir. I disremember just how long she remained here in Magness. I would not say. I haven't any idea at all how long it was. I remember when she left, but I don't remember the date. She was sick when she left. It was that hurt; that shoulder, you know. She was here the night before the day she left, and that morning.

Q. During the night before she left did she complain of any ailments?

A. Yes, sir; she complained. I am familiar with the structure and location of the station at Magness and with the platform at the station. I know the condition of that platform on January 13, 1921. It was chat covered, the same as it is now, but the water stood on it some. It sloped kind of toward the corner of the depot next to the door there. I have no idea how much it sloped. I have seen the station when it rained or snowed.

Q. When it rained, state whether or not the water stood in front of the door in puddles?

A. Yes, sir; the water stood.

[fol. 89] Q. About how big were the puddles?

A. I don't know. Not very large.

Q. During cold weather would these puddles freeze or not?

A. Yes, sir. On January 13, 1921, there was sleet or snow, or something, I could not say for sure; maybe both. I think I was at the station on that day. There was ice in front of the door o fthe station on that day.

Cross-examination by Mr. Hayden:

Q. How do you fix in your memory, Mrs. Sherman, that you were there on the 13th day of January?

A. It just appears to me that I was.

Q. You are not certain?

A. I think I was, because I didn't miss many days going to our store and our store stands right in front of the station, and I generally went out to see her for a few minutes.

Q. Were you accustomed to go down there regardless of what kind of weather it was?

A. Most always usually it did.

Q. And this is the only way that you can fix it that you were there on January 13th, 1921?

A. It seems to me like I was there.

Q. You have no way of deciding definitely on that day? Do you know that was the day she was injured?

A. No, sir.

Q. All you know about her having been hurt there at the station is what she told you herself, isn't it?

A. Yes, sir; and what this other lady that was there said.

Q. That was afterwards?

A. Yes, sir.

Q. Do you know how long afterwards?

A. I think the same day.

[fol. 90] Q. Who was this other lady?

A. Gertrude Fugett.

Q. Both the plaintiff and Miss Fugett told you about the accident?

A. Yes, sir.

Q. Do you remember about what time of the day it was when they told you?

A. No, sir.

Q. When Miss Aeby left here do you know where she went from here?

A. She went from here to her sister's, I suppose, Mrs. McGuire.

Q. At Batesville?

A. Yes, sir.

Q. Do you know how she went?

A. I disremember whether it was in a car or on the train.

Q. Did you see her when she left?

A. Yes, sir; she stayed here the night before.

Q. And left from your house that morning?

A. Yes, sir.

Q. Who left with her?

A. I wouldn't be positive whether there was anybody.

Q. Do you know whether she left alone or whether there was somebody with her?

A. I don't think she left alone, but I don't know who was with her.

Q. And you don't know whether she went away in an automobile or walked away?

A. I don't think that she walked very much, but I disremember which it was."

(Thereupon Mr. Edwards, counsel for plaintiff, passed Plaintiff's Exhibits A, B and C attached to the deposition to the jury.)

(Here follow Plaintiff's Exhibits A, B, and C, marked side folio pages 91 and 92)

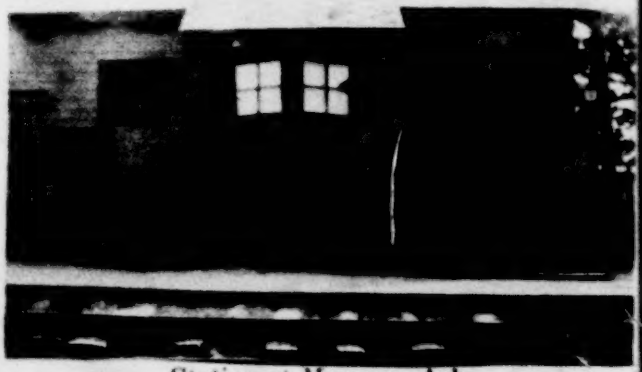
[fol. 92a] Plaintiff rests.

PLAINTIFF'S REQUESTED INSTRUCTION TO JURY REFUSED

Thereupon defendant, by its counsel, presented to the Court, in writing, and requested the Court to give and read to the jury the following instruction, in the nature of a demurrer to the evidence:

"At the close of plaintiff's evidence the Court instructs the jury that under the pleadings and the evidence in this case the plaintiff is not entitled to recover and your verdict must be for the defendant."

PLAINTIFF'S EXHIBIT A.

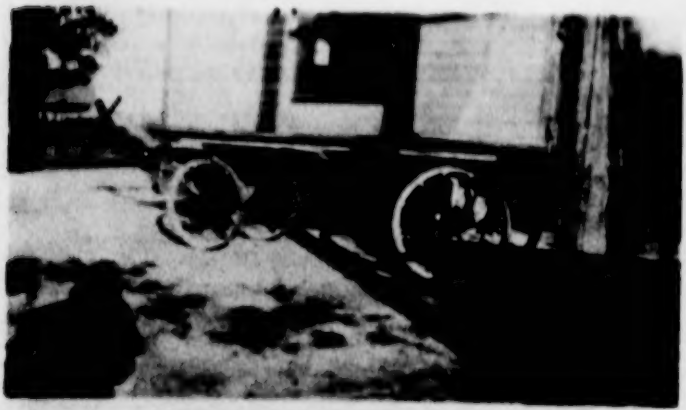


Station at Magness, Ark.

PLAINTIFF'S EXHIBIT B.

Station at Magness, Ark.

PLAINTIFF'S EXHIBIT C.



Which instruction the Court refused to give and read to the jury; to which action and ruling of the Court in refusing to give said instruction defendant, by its counsel, then and there duly excepted and still excepts.

[fol. 93] DEFENDANT'S EVIDENCE

Thereupon defendant, to sustain the issues on its behalf, offered and introduced the following evidence:

JOHN WILLIAM DANIELS, a witness of lawful age, being produced, sworn and examined, on the part of the defendant testified as follows:

Direct examination by Mr. Hayden:

I live at Aurora, Missouri. I am superintendent of the White River Division of the Missouri Pacific Railroad. The stations of Magness, Moorefield and Batesville are on the White River Division of the Missouri Pacific Railroad Company and they are within the division of which I am superintendent. I have been superintendent on that division twice. The last time continuously since March, 1918. I know the plaintiff in this case. I remember when she was employed as station agent at Magness. I knew her when she was caretaker at Moorefield before that. The traveling auditor took her from Moorefield to Magness during a temporary vacancy. Mr. Edens had been the agent at Magness before the plaintiff went there. He was off on temporary sick leave. He is the station agent there now. He succeeded the plaintiff.

Q. Now, did you ever have any conversation with her with reference to her duties there or her authority there at that station?

A. At one time she made complaint to me that Mr. Puckett, the caretaker, wasn't doing his duty in a satisfactory [fol. 94] manner, and I said to her at that time that she was in authority there and had charge over the station and over the caretakers; if the present caretaker didn't do his duty, she should get somebody to take his place.

Q. Did you say anything about whom she should get?

A. No, sir.

Q. That was left to her, was it?

A. Yes, sir.

Q. What was the duties of the caretaker?

A. The caretaker was to meet the night trains, keep fire in the station and lights, and to sell tickets.

Q. Sell tickets for what trains?

A. For the night trains particularly, the late night trains that ran from Newport to Batesville, No. 248 and No. 249.

Q. What duties, if any, did he have with respect to the morning train bound from Newport to Aurora or Carthage?

A. The regular agent's assignment was from 8 a. m.—I can't give you the exact time; there was an hour and a half for meal hour, but 8 a. m. to 5 p. m is my recollection at that time, and the caretaker met the morning train.

Q. Did you ever have any conversation with the plaintiff with respect to her doing the work of the caretaker and collecting his pay for him?

A. I did not.

Q. Did you know at any time while she was employed as agent that she was doing the work of the caretaker?

A. I did not.

Q. Were you there at that station, that is, to be off the train at any time near the 13th of January, 1921?

A. Not that I remember of.

Q. You were not there very many times at all, were you, to get off the train?

A. No, sir.

That is all.

[fol. 95] Cross-examination by Mr. Edwards:

My division is 318 miles long. I had a conversation with plaintiff when I was at the station in Magness. I was there possibly thirty minutes. Immediately under me as division superintendent, having charge of the tracks, is the road master, and then the section foreman. The roadmaster's territory is 125 miles. I have two roadmasters. The road master in charge of that portion of the division in which Magness is located, is Mr. George Wallis. The section foreman was under him. He had approximately twenty three section foremen under him. A section foreman has approximately six miles. He is supposed to cover that territory every day. I frequently went through Magness on

the train. Most of my inspection trips are made by motor car. I don't go on the train very frequently. I would approximate it that I went through Magness on a motor car every ten days.

Redirect examination by Mr. Hayden:

Q. Did the plaintiff ever notify you of any drain or trench or ditch in front of the depot there, in the platform in front of the depot there, at Magness?

A. No, sir.

Q. Did you ever see any such depression?

A. I never noticed it.

Q. What was the occasion of her being relieved as station agent?

A. The regular agent reported for duty, came back and took his position.

Q. When was that, do you remember?

A. Well, he was to come to work, I think it was, the 1st of January, 1921.

[fol. 96] Q. Do you remember, as a matter of fact, when it was that he relieved her?

A. I think about the 24th, somewhere along there, when he went to work.

Q. And that was the same man that had had the place before she was assigned there?

A. Yes, sir.

That is all.

Recross-examination by Mr. Edwards:

Q. You didn't notice that over the door there had been put a little shed or drain. Take this picture that Mr. Hayden has had marked here "Exhibit 6." You didn't notice the change in the station's appearance by the projection over the door or the laying of this plank?

A. Well, I know it has been done.

Q. You know the change has been made?

A. Oh, yes.

Q. When was the change made, Mr. Daniels?

A. Well, I couldn't tell you.

Q. Did you order it made?

A. No, but that comes under the supervisor of bridges

and buildings and comes under repair work, maintenance of stations.

Q. Now, who is that?

A. Mr. Featherstone.

Q. What is his name; I would like for you to spell that name?

A. J. E. Featherstone, F-e-a-t-h-e-r-s-t-o-n-e.

Q. Now, Mr. Featherstone is the man who had charge of the alteration of the station in the respects that I have mentioned, is he?

A. Yes, sir.

Q. He is the man whose province it is, under the orders of the railroad, to look after those matters, is he?

A. Yes, sir.

Q. And you did know that that had been put on there?

A. Yes, sir.

[fol. 97] Q. After Mr. Edens came back this latter time?

A. Yes, sir.

Q. And that this planking had been laid out there after Mr. Eden returned?

A. Yes, sir.

Q. Do you know about how long after Mr. Eden came back on the 21st of January, or whatever that date was, 1921 when Mr. Featherstone ordered the alterations made?

A. No, I couldn't give you the date.

Q. Some little time after Mr. Eden returned from sick leave?

A. I think so.

Q. And Mr. Featherstone is the one that had that done?

A. Yes, sir.

Q. He is in charge of all that work?

A. Yes, sir.

Q. How much territory does he have?

A. He has my full division, 318 miles.

Q. Works with you on the division?

A. Yes, sir.

Q. His office is where your office is?

A. Yes, sir.

Q. Where is your office, Mr. Daniels?

A. At Aurora, Missouri.

Q. So you both have your offices, you and Mr. Featherstone, at Aurora?

A. Yes, sir.

Q. And Mr. Featherstone either told you before he had the alterations made or afterwards that he had had those alterations made?

A. No; possibly he didn't call my attention to it. He made it there possibly on the request of the agent, I don't know.

Q. Did you notice it as you went by?

A. Yes, sir.

Q. You could see that much as you went by the station?

A. Yes, sir.

That is all.

[fol. 98] W. F. Smith, being first duly sworn, testified on behalf of defendant as follows:

Direct examination by Mr. Hayden:

I am a physician and surgeon. I live at Little Rock, Ark. I am a graduate of Beaumont, which is now a portion of the medical department of the St. Louis University. I have practiced since 1898. I was house physician in St. Marys Infirmary in St. Louis for a year after I graduated, was an interne in the City Hospital here also, and then two years with the Frisco Railroad, and I have been practicing in Arkansas since. I was practicing in Little Rock in June, 1921. I have charge of the Missouri Pacific Hospital at Little Rock. I had charge of that hospital in January, 1921. I remember plaintiff being a patient of that hospital in February, 1921. She was operated — February 10, 1921. She remained there until March 10, 1921. During the time she was there she was under my care.

Q. Just state now to the jury what you found her condition and what she was suffering from and what was done for her while she was there.

A. She was admitted at 12:30 a. m. on the 10th day of February, and I did a curettage on her at 9 o'clock that morning. She came in suffering from a bloody discharge from the vagina, which came from the uterus.

Q. What do you mean by curettage? Explain that.

A. Scraped the womb. She had an endometritis.

Q. What is that?

A. That is an inflammatory condition of the membrane of the womb, chronic.

[fol. 99] Q. Did you perform more than one operation on her at that time?

A. That is all.

Q. How long was she there?

A. Until March 10th.

Q. What, in your opinion, was the condition that you found—what, in your opinion, was the cause of the condition that you found?

A. A chronic inflammatory condition of the lining membrane of the womb, and she also complained of a little abdominal tenderness, as is usual in cases of that kind.

Q. What was her condition at the time she left there?

A. All right.

I think that is all.

Cross-examination by Mr. Edwards:

Q. You scraped the womb. That is really an operation, is it?

A. Yes, sir.

Q. Now, your testimony, as I understand it, is that when the lady left there on the 10th of March, 1921, she was all right?

A. She was up and around, and while she was there, the latter part of the time she was in the hospital she would go downtown, and she was discharged at her own request.

Q. I know, but you say she was all right?

A. The condition for which she came had apparently been relieved and she was discharged at her own request, feeling all right.

Q. Now, doctor, I understood you to say that the lady was all right when you discharged her; is that right?

A. Yes, sir.

[fol. 100] Paul F. Vasterling, being first duly sworn, testified on behalf of the defendant as follows:

Direct examination by Mr. Hayden:

I am a physician and surgeon. Graduate of Washington University in 1883, and have practiced my profession

in St. Louis since that time. I am chief surgeon of the Missouri Pacific Hospital. I have been connected with that hospital forty years. I was appointed chief surgeon in 1909 and have been chief surgeon since that time. I know the plaintiff. I remember her being there at the hospital in 1921 and 1922. She suggested that Dr. Darr, who was treating her at Batesville, Ark., recommended a brace, and I saw no special objection to it and ordered it for her. I ordered the brace for her at her suggestion while she was in the hospital. I saw her from time to time, but the other doctors, the other members of the staff, were really treating her. She was treated principally by Dr. Zeinert.

Cross-examination by Mr. Edwards:

Plaintiff was at the hospital at various times from June, 1921, until September, 1922. She would come and go. We received her into the hospital and kept her there.

Redirect examination by Mr. Hayden:

The railroad makes the deductions and keeps the accounts.

[fol. 101] O. B. ZEINERT, being duly sworn, testified on behalf of defendant as follows:

Direct examination by Mr. Hayden:

I have practiced medicine in St. Louis, with the exception of the time I was in the army. I am a graduate of the University of Michigan in the year 1907. I was an interne at the St. Louis Female Hospital and then I was house surgeon for the Missouri Pacific Railroad, and have been on their staff ever since. I was on the staff of the Missouri Pacific Hospital, beginning June, 1921, and all of 1922. I know the plaintiff. I remember her being at the hospital in 1921 and part of 1922. I treated her while she was there.

Q. Just state to the jury what she was suffering from and what was done for her while she was there.

Q. Just state to the jury what she was suffering from and what was done for her while she was there.

A. Why, she was admitted to the hospital on account of excessive bleeding from the vagina; blood came from her uterus or womb; she complained of pain in her right side, and she also gave a history, or saying that she fell and struck her back against a truck, or osmething to that that effect, and I examined her back and couldn't find any evidence of any injury, and I told her what was the cause of her bleeding; she had some trouble up in her pelvis, and also an infected—I mean inflamed—womb following trouble in the pelvis, so I told her the only thing to do for her relief would be to operate on her and stop the bleeding. I suggested that we go into the abdomen, since she had a previous operation; that is, her womb was scraped at Little Rock, and the bleeding again returned, so I kept her in bed for several days until she got strong enough to [fol. 102] stand the operation, so I went to work and operated on her, and I found—I scraped her uterus first, and after that, why, I went to the belly and found that she had a chronic appendix and a bad ovary on the right side; the ovary was practically destroyed, had undergone cystic degeneration, and I removed it. After that I shortened the ligament on the side that supports the uterus, so she would have some support where this organ was removed. Then I removed her appendix and closed her abdomen. She made an uninterrupted recovery, got along very well, and she hasn't had any bleeding since then, to my knowledge.

Q. Did she have any bleeding at the time she left the hospital?

A. None at all.

Q. For how long before she left had the bleeding ceased?

A. Well, she has had no bleeding since the operation, other than—you always get a small amount of bleeding wherever you operate on any woman's ovaries possibly several days after the operation; there is slight bleeding from the vagina, which is perfectly normal in all cases that you work on the ovaries or tubes, but she had practically what you might say, no serious bleeding.

Q. When was it that you operated on her?

A. On June 21st, 1921.

Q. How long did she remain in the hospital after that?

A. Well, she was discharged on our books at the time—I don't remember exactly, but the record showed she was

discharged, I think in November, but she wasn't confined there on account of that operation, because people in an operation of that sort are out of the hospital in six weeks and less than that, fourteen days, sometimes.

That is all.

[fol. 103] Cross-examination by Mr. Edwards:

Except as she was away for little periods of time, she was in our hospital from June, 1921, until September, 1922.

Q. Now, you have mentioned to the jury about shortening the ligaments of the womb. Dr. Morfit, as I understood it yesterday, using his glasses, said that the womb was suspended by ligaments, and he just used the arms of the glasses as an illustration. And is that so, does the womb sort of hang by ligaments?

A. Why, yes, it is suspended by ligaments.

Q. Suspended by two ligaments?

A. Yes, sir.

Q. And you say you shortened one of the ligaments, did you, or both of them?

A. I shortened one of them where I removed the ovary. Her uterus was in good shape before the operation.

Q. Now, had there been misplacement of the womb somewhat?

A. No.

Q. Womb and uterus are the same thing?

A. Yes.

Q. But you shortened one of these ligaments on which the womb sort of hangs; is that it?

A. I shortened the ligament where I removed the ovary.

Q. You did remove, as I understand it now, in the Missouri Pacific Hospital——

A. Yes.

Q. —you removed the right ovary?

A. Exactly.

Q. And the appendix?

A. Yes, sir.

Q. And then, on the side upon which you removed the ovary, you shortened the ligament that held this womb?

A. Yes, sir.

Q. That is all?

A. I had to do that.

Q. I am not criticizing you, doctor. That is a fact, though?

A. That is what I did.

[fol. 104] Mr. Hayden: I now offer the deposition of Mrs. Jetrue Williamson, taken at Fort Worth, Texas, on the 10th day of November, 1923.

Mrs. Jetrue Williamson, being duly sworn, testified on behalf of defendant as follows:

My name was formerly Jetrue Fugett. I now live at 828 Harvey avenue, Fort Worth, Texas. I formerly lived at Magness, Arkansas. I was acquainted with Mary Ida Aeby when she was station agent at Magness. I was at the station at Magness at the time she claimed to have been injured. I don't remember the date. Some time in January, 1919. At that time she had living quarters in the station. I stayed there at the depot with her the night before she was hurt. We both stayed at the depot that night.

Q. What time on the night before she was hurt was it that you went to the station?

A. Well, I don't remember the time; it was before dark though, some time in the afternoon.

Q. You think you went there in the afternoon of the day before she was hurt?

A. Yes.

Q. Did you remain with her there during the rest of that day?

A. Well, I spent the night there; I went down late in the afternoon and then stayed there that night.

Q. Were you there when the train went through there in the evening from Batesville to Newport; that is, the train bound for Newport?

A. Yes, I suppose so, because it was through there kind of late.

Q. Do you remember whether you and she left the depot [fol. 105] at all that night, after that train went towards Newport?

A. I don't remember.

Q. What was the condition of the weather that night as well as you noticed it? I am speaking now of the night before the accident.

A. I don't think it was snowing when we went to bed.

Q. You don't remember that it was snowing when you went to bed?

A. No, sir.

Q. Now, do you remember about what time you got up on the next morning?

A. Well, we always got up in time to meet that train that came through there at 6 something.

Q. You refer to the train that came from Newport to Batesville?

A. Yes, sir.

Q. Do you remember whether you and she got up before that train went through there that morning?

A. You mean the real early train?

Q. I mean the train that is due through there or that was due through there about 6 something in the morning.

A. Is that the train from Newport to Batesville?

Q. Yes, the train from Newport to Batesville.

A. No, she didn't meet that train; I don't think we were up then.

Q. You don't remember what time you got up, whether——

A. No, sir.

Q. —whether it was 6 or before 6, or after?

A. It was before 6.

Q. Before 6?

A. Yes.

Q. Was it daylight when you got up?

A. I don't know whether it was daylight or not.

Q. You don't remember that?

A. No, sir.

Q. Well, do you remember anything about moving the truck that morning out on the platform?

A. Yes.

[fol. 106] Q. Did you assist her in moving the truck?

A. Yes.

Q. Was it daylight at that time?

A. Yes, it was almost daylight. It was light enough to see, I know.

Q. How far could you see from the station, that is, when you were out on the platform at the time you moved the truck?

A. I don't know.

Q. Well, could you see the various houses around close to the station?

A. Sure.

Q. Could you see as far away as the Post Office?

A. I don't know about that.

Q. Who went out of the depot first that morning when you went out to move the truck?

A. She went out ahead of me.

Q. She went out ahead of you?

A. Yes.

Q. You know how long before she went out?

A. You mean to move the truck?

Q. Yes.

A. I went out before we started to move the truck, then she went out and I went out to help her.

Q. You went out first before you moved the truck?

A. Yes, sir.

Q. That is, you were the first one out of the depot?

A. Yes, sir.

Q. About how long would that be before you moved the truck?

A. I don't know; it wasn't very long.

Q. Was it as much as five or ten minutes; that long or not so long?

A. Well, it was not more than ten or fifteen minutes, I am sure.

Q. What did you observe when you went out first that morning with reference to the conditions around there as to rain or snow or ice?

A. I do not know whether it was snowing when I went out, but I know it began snowing and it was slick out there and I was sliding.

[fol. 107] Q. That is when you first went out?

A. Yes.

Q. What was that platform composed of, that is, the depot platform?

A. You mean at that time?
Q. Yes.
A. Well, it was just ice and snow.
Q. What was it made of, what was the character of it?
A. Crushed rock or something; I don't know what it is.
Q. It was not a board platform?
A. No.
Q. When you went out first that morning you say you slid down the platform?
A. Yes.
Q. At that time was it covered with ice or snow?
A. Yes.
Q. Which was it?
A. Ice and snow.
Q. Ice and snow?
A. There was a little thin sheet of snow.
Q. Did that extend all over the platform?
A. Yes.
Q. Did you notice whether it extended any place else besides the platform?
A. I suppose it was all over the ground.
Q. Did you notice at any other time that morning whether it was or not?
A. The steps were covered with ice and snow.
Q. Coming out of the station do you step right from the floor of the station onto the platform or is there a step between the station platform and the floor?
A. If I remember right, there were two steps from the station there.
Q. Your recollection is you go down two steps?
A. Yes.
Q. What were those steps made out of?
A. Wood.
Q. Was there any snow or ice on those steps?
A. Mostly ice.
Q. Now, where was the truck before either of you tried [fol. 108] to move it?
A. It was out at the side of the station.
Q. At the side or at the end?
A. Well, I do not know whether you call it the end or not; I suppose it was the end.

Q. As you come out of the station, which way would you turn to go to where the truck was?

A. To the left.

Q. To the left. Now, did you and she both move the truck?

A. Yes.

Q. How did you place yourselves with reference to the truck?

A. Well, she was pulling and I was trying to push; it was slick out there.

Q. Where did you move the truck from and to; where did you take it?

A. We moved it from where it was over to the track.

Q. About how far would that be that you moved the truck?

A. Well, I don't know; about the length of the station, I imagine.

Q. Then after you moved the truck over towards the track, what did you and she do?

A. Well, the train was coming in then and I went back into the station. Of course, she met the train.

Q. Did she come back to the station between the time that you placed the truck and the time that the train went through?

A. I don't remember.

Q. But you went back to the station after placing the truck?

A. Yes, sir.

Q. Did you see anything that she did after that and before she came into the station?

A. No.

Q. Did you see her when she fell?

A. No.

Q. Did you know that she fell, except what she told you?

A. Well, I either saw her getting up, or she kind of [fol. 109] staggered into the door, and I knew something had happened.

Q. Did you see where it was she fell?

A. No.

Q. Do you know where she fell?

A. No.

Q. Now, did you and she have any conversation before she came out of the depot that morning?

A. About what?

Q. About whether there was any snow or ice on the platform?

A. I don't remember about remarking about it, about the ice or snow before we came out.

Q. Did you have any conversation after you came out and before you went back into the station again?

A. Nothing other than the platform being slick or something like that.

Q. Did she say anything about that?

A. I don't remember.

Q. You don't remember anything?

A. I remarked—I told her to look how slick it was. She told me I was going to fall. I was sliding out there.

Q. That conversation was when you were sliding on the platform?

A. Yes, sir.

Q. Was that before you moved the truck or afterwards?

A. That was before.

Q. Did you have any difficulty in moving the truck?

A. Yes.

Q. Just what was that?

A. The truck was frozen to the ground.

Q. Did that make it hard to move?

A. Yes.

Q. Well, did both of you exert yourselves in moving the truck?

A. Well, I know we had a rather hard time getting it up there.

Q. Now, how long did you remain there at the station that day after that train went through?

[fol. 110] A. I went home some time that morning; I don't remember the time.

I went back the next morning. I don't remember whether I went back that day or not. I don't remember the day when Miss Aeby left Magness. I went to see her every day after she was hurt. I lived about a mile and a half or two miles from the station.

I know a young lady by the name of Pearl Jones at Magness. At that time she lived just across the track. I imagine about a block. I don't remember seeing her there

at any time the morning of this accident. I don't know that I had any conversation with Miss Aeby at any time during that night about the condition of the weather. I don't know anything about what time of night it snowed or rained. I don't remember whether there were any lights in the station that were lighted before either of us had gone out of the station that morning. I don't remember whether Miss Aeby lighted any of the lights in the station before we went out.

Cross-examination by Mr. Paddock:

The station had one story. The room that she occupied in which I visited with her was adjoining the ticket office. I do not recall the condition of the weather the day before this morning about which I have testified, whether it was raining or not. The ice was not on the platform when we went to bed that night. The station faces west. The movement of this truck to which I have referred was in the performance of the duties of Miss Aeby. The truck was used to carry express from and to the trains. I don't think she handled the mail. There was a train through there [fol. 111] earlier that morning that she did not meet. I do not remember whether it was signaled to stop on that morning. I have no knowledge of her getting up to meet that train. That was a passenger train. This station has a waiting room and then the ticket office and I guess you call it a baggage room. There was a coal stove in the passenger's waiting room. There was another stove in the ticket office. The room that we slept in was right by the ticket office. To get out of that room she had to go through the ticket office into the waiting room or go through the baggage room. When I went out first from the bedroom I went through the waiting room. Miss Aeby came out that way, too. She could have gone through the other room, but I don't think she went out through the baggage room. I went out some few minutes ahead of her. I found the platform covered with ice and snow on top of the ice.

Q. Was there any guttering around the roof of that that you know of?

A. I don't know.

Q. When it rains where does the water run, do you know?

A. No.

Q. Isn't it true the water from that roof, as a matter of fact, just runs down off the roof on the station—what is called the platform—and this dirt or stone or gravel space between the station and the tracks that is built of stone or gravel, or whatever it was. The water from the roof just runs off onto that?

A. I couldn't say as to that.

Q. When you went out to move this truck, the purpose of it was to have it ready when this train came in, which was performing her duties as station agent. Was that what she was called?

A. Yes. That is what was done. She was not just out [fol. 112] there taking a ride on the truck in the morning. When we moved the truck I did not stay out until the train came. I went on in the house. Miss Aeby stayed out. She put on her coat and gloves and wrapped up. It was cold enough. When I went back in there I went to the bedroom and waited there until the train had come and gone. I don't remember whether anyone got off that train that morning. Miss Aeby did not go back in until the train came. I was not on the platform when she fell. I was in the station. The door was open. She did not hallow at me. The first I remember she kind of like she was staggering up the steps, or holding to the door to come up the steps. I asked her what was the matter and she told me that she had fallen. She did not say where she had fallen.

Q. What steps were these at, Mrs. Williamson? When you saw her staggering up the steps, which steps were those, into the waiting room?

A. Yes.

Q. When you say there are two steps there, do you mean that they are built up—two steps that you have to step on—and then have a third step onto the ground, or that you stepped onto one step and then on the ground?

A. No; there are two steps, and then the ground. As you came out of the door you were first on the threshold of the door, then one step, and two steps, then on the ground. Those steps are right under the eave of the building. I had been there when there was not any snow or ice on the ground.

Q. Did you notice the accumulation of ice at the foot of the steps from the frozen drippings of water from the roof?

A. Yes. That was at the foot of the steps where you went down from the door onto the platform and on the [fol. 113] steps. I do not remember whether it was thicker on the steps or on the platform. I just remember the ice was there. After I saw Miss Aeby staggering up the steps she came into the ticket office where I was and was lying down on the couch. She did not say why she was lying down on the couch, but she told me she was hurt, and she was awfully white, like she was going to faint. I went to the store and got some liniment and rubbed her shoulder and back. She told me it was her shoulder and back. If I remember right, I rubbed on down to her hips. I do not remember of rubbing her back but the one time. I don't remember of anyone being there when I left. I don't know whether Miss Aeby ate her breakfast in the station or not. She ordinarily did her own cooking there. I went back the morning following the date on which she was hurt. I don't remember the lady's name she boarded with before she began living at the station, but she was at her house. I think she spent that night over there instead of at the station. I do not remember whether she was in bed when I found her. I believe she was. I asked her about her injuries and she told me how she had been during the night. She told me she was suffering, and referred to her back again. I believe I saw her several days in succession following that. She was able to carry her part of the load when we went out to move the truck. I went with her to St. Louis when she was operated on. She was not able to make the trip alone, and she asked me to go with her. She was not bed fast, but she was not able to get on and off trains. She came from Batesville, but I got on the train at Magness. [fol. 114] She telephoned me and said she did not feel able to go alone. It is an all night ride from Magness to St. Louis. As soon as we got to the hospital she went right to bed and then I left. I was not there when she was operated on. I do not know how long it was after the accident that I went to St. Louis with her.

Q. What room were you in; were you in the waiting room, ticket office or bedroom when you first saw Miss Aeby staggering in the door?

A. Well, I was either in the door between the waiting room of the ticket office or in the ticket office.

Q. Could you see her?

A. I saw her as she came in the door. I do not remember just where I was.

Q. You saw her coming in the door?

A. Yes.

Q. From where you were do you know how far you could see out on the platform, or were you looking out on the platform?

A. Looking out.

Q. Did you hear her scream, or anything of that kind?

A. No.

Q. Just looked up and saw her staggering in the door, that is the first you saw?

A. That is the first I saw.

Redirect examination by Mr. Hayden:

"Q. Whereabouts was it on the platform where you were sliding that morning?

A. In front of the station.

Q. About how far in front of it?

A. I don't remember.

Q. Well, was it nearer the station than the track?

A. Yes, if I remember right it was; I do not remember where I was sliding.

Q. Were you sliding lengthwise with the station or towards the station?

A. Lengthwise with the station.

[fol. 115] Q. Lengthwise with the station?

A. Yes.

Q. In the same direction that the station sets; is that it?

A. Yes.

Q. But the whole station platform was covered with snow and ice that morning, was it?

A. Yes.

Q. And at the time you moved the truck do you remember whether it was snowing or not?

A. I do not remember.

Q. Did you see it snowing that morning at all?

A. I think it snowed some; a little snow that morning.

Q. When you think you saw the snow falling was that before the train came?

A. I don't remember."

Recross-examination by Mr. Paddock:

I didn't go back that day at any time after the accident to examine the place where Miss Aeby had fallen. I never made a physical examination of those steps and the depression caused in the platform where this ice accumulated other than noticing how slick the steps were. That was that same morning. I had been in the station all the time she was meeting the train.

Redirect examination by Mr. Hayden:

Q. Now, you were asked about the moving of the truck being a part of her duties. All you know about that is that you moved the truck up there that morning?

A. Yes, I know she moved it every time.

Q. Whenever you were there and that train was going through there she would move the truck out to the train; that was all you know about that part of it?

A. Yes.

[fol. 116] Walter C. Ekoss, being duly sworn, testified on behalf of defendant as follows:

Direct examination by Mr. Hayden:

I have lived at Magness since 1911. I am employed by the Missouri Pacific as station agent at Magness. I have served in that capacity two different times. The last time since July 20, 1918. I was on leave of absence from July, 1920, to January, 1921, but my seniority dates from January 20, 1918. I left there on leave of absence on July 2, 1920, and was gone until January 21, 1921, when I came back to Magness and resumed my work as station agent. The plaintiff was agent there while I was away. I saw her on my return in January, 1921, at the station. On January 21, 1921, the transfer of the station back to me was made and I have been agent there ever since and am now.

(Witness identifies Defendant's Exhibit 7 as a correct representation of that portion of the platform at the west end of the station at this time; witness also identifies Defendant's Exhibit 8 as a correct view at this time of the station.)

I was present when those photographs were taken. Exhibit A is a front view of the station, almost directly in front of the station. When that picture was taken the camera was placed across the track from the station. Assuming that the station faces north, the camera would be to the north of the track. At this time there were some boards, or what are known as a grain door, on the platform near some steps going into the waiting room. I placed them there. I cannot say when I did it, because [fol. 117] sometimes they are up there and sometimes they are not. In muddy weather I put them there so they could clean their feet on there instead of taking it into the house. I tried to have them there in muddy weather, and when it is not muddy I take them away. I do not always do that, however. Sometimes it might remain there thirty days and other times it would not remain there a week. Over the door going into the waiting room there has been a roof, or extension, placed. I think that was placed there about two years back. I put it there at the direction of the supervisor of bridges and buildings, Mr. Featherstone. I called on him. He told me to go ahead and fix anything I thought would keep the water from flying back into the house and I put the roof over the door. I would think this roof extended out from the north wall of the building twelve or thirteen inches. It is a narrow extension. I think it comes out from the north wall of the building twenty-four inches straight out. There are two steps from the waiting room to the depot platform. Each step is about twelve inches wide.

Q. Now, aside from this grain door and this extension over the roof, are the station and platform in the same condition now that they were when you were there before July, 1920, and after January 1921?

A. Well, it is practically the same thing; just about the same.

The platform in the vicinity of the station slopes to the west, assuming that the depot faces north, and then at the west end of the depot it seems to cut around the corner a little bit on that portion of the ground there to the south of the platform. The west end of the platform is lower than the platform. I should think probably an inch, and [fol. 118] then, of course, it gets more level the farther out it gets away from the platform; the platform is practically

level. At the west end of the depot and south end of the platform, going towards the south, the ground at the back of the depot is about six inches lower than there at the front of it.

Q. Now, when you were station agent there, before you took this leave of absence, did you have a caretaker or helper?

A. Well, I had had, and I think that I had him up to that time. Sometimes the caretaker was on sometimes he was off; doesn't work regular all the time.

Q. Now, when you came back on the 21st of January, what arrangements, if any did you have with reference to a caretaker?

A. Well, Mr. Garner was serving as caretaker then; that is, they were carrying him as such.

Q. Who told you that he served as caretaker?

A. Well, I couldn't say that. I suppose Miss Aeby told me that she was using Mr. Garner.

Q. Did you have any conversation at that time with Mr. Daniels about it?

A. No, sir; I did not.

Q. Or with any other official of the company?

A. None whatever.

Q. And you didn't learn of that fact from any official of the company?

A. No, sir.

Q. But you did ascertain that Mr. Garner was being carried as caretaker?

A. Yes.

Q. Did you continue that arrangement?

A. I did for a while; yes, sir.

Q. For how long?

A. I couldn't say how many months.

[fol. 119] Q. And then was that arrangement terminated?

A. Yes, sir; Mr. Daniels ordered me to discontinue it.

Q. You received orders from Mr. Daniels to discontinue it?

A. Yes, sir.

Q. During the time that that arrangement continued after you came back did Mr. Garner actually work there?

A. No, sir.

Q. Where was he employed?

A. He was employed about four miles from Magness on Mr. Rutherford's plantation as bookkeeper or clerk.

The distance from the station across the platform to the south rail of the track, the width of the platform immediately in front of the station is about 12 feet. Its entire length is about 300 feet. The depot is about 16 x 48 feet. There is a lamp in the ticket office. I can't say whether that was there in January, 1921. When I took the station over in January, 1921, there were two or three lamps around there. I wouldn't say that there was one in the window. We had a table lamp that we used quite a bit. There is a socket in the window there.

Q. I show you photograph here marked "Defendant's Exhibit 4," calling your attention to a lamp that shows in the window there and ask you what you know, if anything, about that lamp or the socket in which it appears to rest there?

A. Well, that socket has been there many years, I am sure because it was painted when the house was painted and that was before I went there in 1920. It was there before I went there in 1920 and is there now. That is the socket where the lamp fits. That is a regular lamp the company furnishes and it can be removed. There is a lamp there at this time.

[fol. 120] Q. About how far out from the north wall of the building does that bay window come at its point furthest towards the north?

A. Well, I should think it would project out about twenty four inches.

I had no particular conversation with Miss Aeby when I removed here on the 21st of January. I did not transact any business with her any more than regular transfer work. That consisted of checking everything that is in the station, transferring it to me. I checked over, put my check mark on every item listed and then added my signature at the time to the report made out to the traveling auditor. She was present when that was done. She did not say anything to me about having been injured there at any time before that. I should think it took three or four hours to make that transfer.

Cross-examination by Mr. Edwards:

At one time I carried my wife as caretaker. I am sure that was before I went away in 1920. I didn't expect her to stay at the station from 5 o'clock in the afternoon until 8 o'clock the next morning. That wasn't the duties of the caretaker to stay at any time all night. He is supposed to do the rest of the work after 5 o'clock and before 8 o'clock in the morning, any regular station work that is to be done. That is the duty of the caretaker. My wife didn't stay there alone and meet the evening trains and the morning trains when I had her as caretaker. Sometimes I could get someone as caretaker and sometimes I couldn't. Mr. Garner lived out on a farm. I carried him as caretaker for several months and I did the work and at the time that I [fol. 121] was carrying Mr. Garner as formal caretaker he lived out on a farm and I met that 6:41 southbound train at night. I never met the hot shot. I met the 6:18 train in the morning that is train No. 214. I met it every morning. When I didn't have a caretaker I had to meet it. The other times I did it personally.

Q. And the company knew you were doing that, didn't they?

A. Well, I don't know about that. Mr. Daniels ordered me to discontinue the practice of carrying Mr. Garner as soon as he learned of it.

Q. Then did you get somebody else?

A. Yes, sir.

Q. But Mr. Daniels knew you were giving personal attention to No. 214 when she came in in the morning from the south, didn't he?

A. I don't know. He is my superior. I had to look after 214 or see that it was done. I didn't place the truck for it very often—not unless I had something to move on it. Then if I had I would place it. If I had baggage or something to load on it was necessary to move the truck out. We have a section foreman who covers the territory of six miles. He is supposed to come there observing the condition of things around there once a day. That is his duty. The pictures which I have identified were taken about sixty days ago. I told Mr. Hayden that the platform slopes to the west a bit and then cuts around the corner. It is on a natural drain to the west on account of being on a hillside,

you might say. If you consider the station facing north the slope is to the west. These pictures represent the station where it was when I came back on the 21st of January, 1921, with the exception of these planks. They are laid out just beneath the two steps with the exception of this extension that is over the door. Mr. Featherstone told me I [fol. 122] could fix it up any way that would keep the water out. For the grain door no one ever told me that. I just put that on to keep people from tracking in there. Mr. Daniels could see the grain door and this extension in passing. I put this projection over the door after I came back on the 21st of January, 1921. It wasn't there when I came back on the 21st of January, 1921. Miss Aeby could change the lights around there any way she seen fit. There were no rules as to where you should have a light.

Redirect examination by Mr. Hayden:

The company furnishes these grain doors for shipping cotton. I ordered them any number I might need. I try to know about how many cars I will have in a season and get grain doors sufficient to take care of the loading; usually place six doors in a car, sometimes eight. If I happen to have one that was not in use when we would get them unloaded, they would put it down in front of the station.

Recross-examination by Mr. Edwards:

I make a requisition on the superintendent for these grain doors same as I do anything else. That would be a requisition on Mr. Daniels.

James B. Gaenee, being duly sworn, testified on behalf of defendant as follows:

Direct examination by Mr. Hayden:

I live at Sulphur Rock, Arkansas. That is something like three and a half or four miles west of Magness. I am [fol. 123] a bookkeeper, employed by M. M. Rutherford, who is engaged in general farming, dairying, runs a com-

missary, big plantation man. I have been employed by him as bookkeeper something like four years. I was in the employ of the Missouri Pacific Railroad Company at Magness, Arkansas. I think the first time I was in the employ as agent there at the station in 1918. I began there in May and worked until July. I worked until I was called out to go to the army in 1918. After I came back from the army, I was first helper and then I worked as relief agent for one month in 1918. I relieved Miss Aeby a few days at a time. I suppose I was carried there as helper. At that time I was also in the employ of Mr. Rutherford.

Q. And when did you report there at the station for work during that time while Miss Aeby was there?

A. I don't remember. I don't know just when. Some time after she was in there as agent I was down there and she had had a helper, I believe he had been the helper there and something come up and she wanted to get rid of him and asked me to be helper if I would fill bond there for the station.

Q. She employed you as helper?

A. Yes, sir.

Q. Now, you didn't work there regularly as helper, did you?

A. No, sir.

Q. Whenever you worked there, what were the circumstances under which you went there to work?

A. Why, I would go down to work when she would want to go away somewhere.

Q. Just whenever she sent for you?

A. Yes, sir.

Q. And on those occasions what hours would you work?

A. Well, I would work there. I would work all the trains, I would work all the time from the time she left until she [fol. 124] returned.

Q. How long would that be at a time, usually?

A. Well, usually about a day, but I think I worked there one time probably three or four days, I don't remember.

Q. Those times was she there?

A. No, sir.

Q. And how long did that arrangement continue?

A. Why, from the time that she hired me until she left the office, and probably after Mr. Edens came back and

taken charge I think he carried me a month or two probably then, I don't know just how long.

Q. Did you receive any money for working as helper there?

A. I received money when I worked.

Q. How is that?

A. When I did any work I got paid for it.

Q. That is, during these times when she would be away?

A. Yes, sir.

Q. Who would pay you that money?

A. Miss Aeby.

Q. Did you ever receive any checks from the railroad company?

A. I don't really think I did. I don't think I worked—the only time when I was employed when I drew a railroad check was when I would work fifteen days and draw a check for it.

Q. Did that occur at any time after Miss Aeby was employed?

A. I don't think so.

Q. You have no recollection of that?

A. No, sir.

Q. Were you there working for her at the time she was injured, that is, on the 13th of January, 1921?

A. No, sir.

Q. Do you know when it was that you had worked there last before that day?

A. No, sir; I didn't know when she got hurt.

[fol. 125] Q. You don't have any recollection when you worked there with reference to either before it or afterwards?

A. No, sir.

That is all.

Cross-examination by Mr. Edwards:

Q. Mr. Garner, how long after Miss Aeby left, about, now, did Mr. Edens carry you?

A. I couldn't really say how long it was, probably a month or two. The only thing that called it back to my memory, I was down there one day and he told me he was going to have to turn me off there.

Q. He carried you on for some time, did he?

A. Some little time, but I don't know how long it was.

Q. Now then, you have mentioned to Mr. Hayden that you filled out a bond?

A. Yes, sir.

Q. With whom was that bond?

A. Fidelity Bonding Company, I believe.

Q. And was that a bond that you gave to the Missouri Pacific?

A. Yes, sir.

Q. In other words, before you went on as a helper and relieved her when she wanted relief, why, you gave to the Missouri Pacific Railroad Company a bond with the Fidelity and some other company as surety?

A. I suppose that the railroad company paid these bonds, I don't know, I just filled it out, I don't know the circumstances.

(Referring to Defendant's Exhibit 7 and 8.)

The projection over the door was not there when Miss Aeby was there and these planks at the base of the steps were not there then. I don't know who put them on. They were put on later. The eaves of the station extended over the station itself, and where the water dripped off of the eaves at the foot of the steps there was a sort of a [fol. 126] ditch. Right at the base of these steps water had formed a ditch from falling from the eaves and running around the steps. This ditch ran around from the steps to the west and then to the south. There wasn't any protection over the door step at the time the plaintiff was there. The platform was just made of chat. That is kind of crushed rock. It looks like when you see in the corner of ths Exhibit 4 between the steps and that plank.

Q. Now, you had seen, while Miss Aeby was there, puddles of ice—not while she was there, but before that, when you were there—puddles of ice two or three feet across at the base of these steps, didn't you?

A. I don't know whether it was practically at the base of the steps, but they would form around on the platform.

Q. Well, you have talked about this ditch that runs by the steps there to the west and south.

A. This ditch now extends plumb the full length of the building.

Q. I know, but it is deeper right here as it approaches the west and the south, isn't it?

A. I don't know that it is any deeper; no, sir.

Q. Why, the people have worn that away more or less, haven't they, as they come in, in these steps over this place?

A. It is probably worn some, more than anywhere else.

Q. Now, at that place before she came, while you were station agent you had seen puddles of ice form there, hadn't you, two or three feet across?

A. I don't know that I had seen any directly in front there. I have seen it on the platform. I don't know just exactly the position of it.

Q. Well, you wouldn't say it wasn't right there, would [fol. 127] you?

A. No, I wouldn't say positive just where on the platform it was at.

Q. After Miss Aeby left, and you were carried on by Mr. Edens, why you rendered the same kind and the same class of service that you had rendered before, didn't you?

A. Practically the same; yes, sir.

Q. Your relations to the railroad didn't change after she left while you were continued by Mr. Edens, did they?

A. Not that I know of.

Q. Remained just about the same?

A. As far as I know; yes.

That is all.

Redirect examination by Mr. Hayden:

Q. You don't know anything about what the arrangements were, do you?

A. No, sir.

Q. You never heard any of them made in the presence of any of the officials of the road, did you?

A. No, sir.

Q. All you know is what you were told by Miss Aeby or Edens?

A. Yes, sir.

Mr. Hayden: Mark these "Defendant's Exhibits 10 to 18."

(Said checks were marked by the reporter as "Defendant's Exhibits 10 to 18," inclusive.)

Mr. Hayden:

Q. I show you some checks here, Mr. Garner, that are marked for identification "Defendant's Exhibits 10 to 18," inclusive, dated September 15th, 1920, September 30, 1920, October 15th, 1920, November 1st, 1920, November 15, 1920, November 30th, 1920, December 15th, 1920, December 31st, 1920, and January 15th, 1921, all purporting to be payable to J. E. Garner and issued by the Missouri Pacific Railroad Company, and ask you to examine them and see if the name [fol. 128] "J. B. Garner" appearing as an endorsement on the back of them, on any of them, is in your handwriting?

A. No, sir.

Q. What is your answer to that?

A. No, sir.

Q. That is, none of the names "J. B. Garner" appearing on the back of those checks were written by you?

A. No, sir.

Q. Do you find any other name on there as an endorsement on the back of those checks?

A. M. I. Aeby.

Q. Do you know her handwriting?

A. No, sir.

Q. You don't know whether she signed them or not?

A. No, sir.

That is all.

Recross-examination by Mr. Edwards:

Q. Mr. Garner, Mr. Hayden has shown you some checks here, made out to your order, $12.50, or approximately that. Did you understand that Miss Aeby was going to receive the money on these checks and then compensate you for the time you spent when you did relieve her?

A. Yes, sir.

Q. You understood that, did you?

A. Yes, sir.

Q. And you had no objection on earth if she or any body else signed your name to these checks?

A. Well, I don't know as I give her any authority or anyone else to endorse them.

Q. Well, you never received the checks?

A. No, sir.

Q. You knew they were coming in regularly or should come in regularly?

A. I didn't know whether they were coming at all or not.

Q. Well, you never inquired?

A. No, sir.

Q. You know that under the arrangement they would have come in regularly?

A. Yes, sir.

Q. You never made any objection or any inquiry with reference to a matter of that kind?

A. No, sir.

[fol. 129] Q. None on earth, did you?

A. No, sir.

Q. And you continued to do under Mr. Edens the same way you had done under her right along?

A. Yes, sir.

Q. Now, you wouldn't work, or would you have worked at that station from 5 o'clock in the evening until 8 o'clock next morning and met the evening train and the morning train, no matter whether they were late or otherwise, provided they were within that period, and done the work incident to the Hot Shot if it had been flagged and stayed there regularly from 5 o'clock in the evening until 8 o'clock in the morning for twenty five dollars a month?

Mr. Hayden: I object to that as immaterial and contrary to the facts already in evidence, brought out by his own cross-examination.

The Court: Sustain the objection.

Mr. Edwards: Mr. Daniels says that the station agent was supposed to stay from 8 o'clock in the morning until 5 o'clock at night and the helper would stay from 5 o'clock in the evening until 8 o'clock the next morning.

Mr. Hayden: The testimony is, he didn't have to do anything of the kind, brought out by you and by your own plaintiff.

The Court: Nothing pending, gentlemen.

Mr. Hayden: I object to the question.

The Court: It was sustained.

Mr. Hayden: I didn't hear your Honor's ruling; I beg your pardon.

Mr. Hayden: I now offer in evidence Defendant's Exhibits 4, 5, 6, 7 and 8, the photographs heretofore identified, and pass them to the jury.

Said photographs are as follows, to wit:

(Here follow Defendant's Exhibits Nos. 4, 5, 6, 7, and 8, marked side folio pages 130, 131, 132, 133, and 134)

[fol. 135] Defendant rests.

Plaintiff rests.

This was all the testimony offered or introduced in the case.

DEFENDANT'S REQUESTED INSTRUCTION TO JURY, REFUSED

Thereupon, at the close of the whole case defendant, by its counsel, presented to the Court in writing, and requested the Court to give and read to the jury, the following instruction in the nature of a demurrer to the evidence.

"At the close of all the evidence the Court instructs the jury that under the pleadings and the evidence in this case the plaintiff is not entitled to recover and your verdict must be for the defendant."

Which instruction the Court refused to give and read to the jury; to which action and ruling of the Court in refusing to give said instruction defendant, by its counsel, then and there duly excepted and still continues to except.

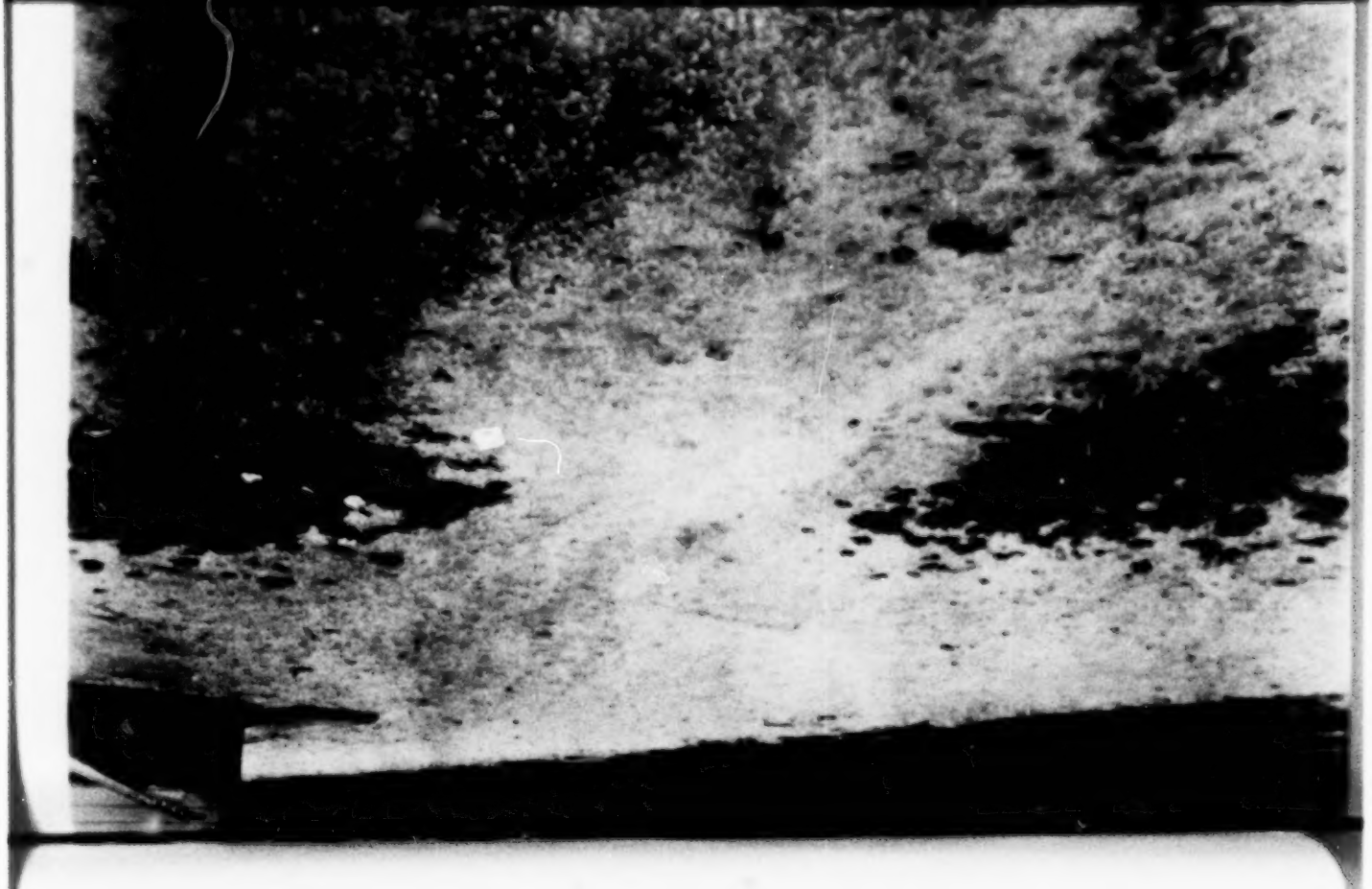
[fol. 136] Instructions

PLAINTIFF'S MODIFIED INSTRUCTIONS TO JURY GIVEN

Plaintiff presented to the Court and requested the Court to give and read to the jury the following instructions:

"The Court instructs the jury that if you believe and find from the evidence that on and prior to January 13th,

MAGNESS



1921, the plaintiff was in the employ of the defendant as station agent at its station in Magness, Arkansas;

And that the defendant maintained between its said station and its rails a platform, and that it was plaintiff's duty to pass over and along said platform and deliver to and receive from passing trains express, mail and other things carried by defendant, and to place a truck in position for receipt of same from defendant's trains;

And if you believe that defendant's platform had been so hollowed out and worn away in front of the station door that a depression formed in front of said door in which water, falling on the roof of defendant's station and flowing over its platform, accumulated therein;

And if you believe that on the night of the 13th of January, 1921, it rained, and that the rain falling on the roof of defendant's station and on its platform flowed into the depression in front of said depot door and formed a sleek and ice-covered irregular surface therein, and that same [fol. 137] was, at the times mentioned in the evidence, covered with snow, and that said platform at that point was not level, but slanted towards the depression, and if you further believe that sleet and snow fell upon said ice and thereby formed a sleek and slippery surface in front of said station door which rendered said station platform not reasonably safe for a person to walk upon and pass over;

And if you further believe that the climatic conditions in and around Magness, Arkansas, at that season of the year were such that the defendant, as a reasonably prudent railroad operator, could reasonably have anticipated that rain, sleet and ice would fall and accumulate in said depression, and, after so accumulating, was likely to freeze and thereby form a sleek and slippery surface unsafe for persons to pass over;

And if you further believe that the plaintiff fell and was injured while in the act of passing over defendant's platform into defendant's station because of and on account of the sleek and slippery irregular slanting surface (if you so find the fact to be), in front of said station; and if you further find and believe from the evidence that no freeze had theretofore taken place while she was in Magness;

And if you further believe that the defendant could, by the exercise of ordinary care, have erected and maintained

said station platform so as to prevent it from becoming unsafe (if you find it was unsafe) in rainy and freezing weather, and that the defendant negligently failed to so erect and maintain its platform, and if you find that plaintiff did not assume the risk of injury as explained in other instructions, then you will find for the plaintiff."

[fol. 138] The Court refused to give said instruction as requested, but, after modifying same, gave and read the same to the jury in its modified form; said instruction, so modified, numbered 1, being as follows:

1

"The Court instructs the jury that if you believe and find from the evidence that on and prior to January 13th, 1921, the plaintiff was in the employ of the defendant as station agent at its station in Magness, Arkansas;

And that the defendant maintained between its said station and its rails a platform, and that it was plaintiff's duty to pass over and along said platform and deliver to and receive from passing trains express, mail and other things carried by defendant, and to place a truck in position for receipt of same from defendant's trains;

And if you believe that defendant's platform had been so hollowed out and worn away in front of the station door that a depression formed in front of said door in which water, falling on the roof of defendant's station and flowing over its platform, accumulated therein;

And if you believe that on the night of the 13th of January, 1921, it rained, and that the rain, falling on the roof of defendant's station and on its platform, flowed into the depression in front of said depot door and formed a sleek, ice-covered irregular surface therein, and that same was at the times mentioned in the evidence covered with snow, and that said platform at that point was not level, [fol. 139] but slanted towards the depression; and if you further believe that sleet and snow fell upon said ice, if such you find, and thereby formed a sleek and slippery surface in front of said station door which rendered said station platform not reasonably safe for a person to walk upon and pass over;

And if you further believe that the climatic conditions in and around Magness, Arkansas, at that season of the year

were such that the defendant, as a reasonably prudent railroad operator, could reasonably have anticipated that rain, sleet and ice would fall and accumulate in said depression, and, after so accumulating, was likely to freeze and thereby form a sleek and slippery and irregular surface, unsafe for persons to pass over;

And if you further believe that the plaintiff fell and was injured while in the course of her employment and in the act of passing over defendant's platform into defendant's station because of and on account of the sleek and slippery irregular slanting surface (if you so find the fact to be), in front of said station; and if you further find and believe from the evidence that no freeze had theretofore taken place while she was in Magness;

And if you further believe that the defendant could, by the exercise of ordinary care, have erected and maintained said station platform so as to prevent it from becoming unsafe (if you find it was unsafe) in rainy and freezing weather, and that the defendant negligently failed to so erect and maintain its platform; and if you find that plaintiff did not assume the risk of injury as explained in other instructions, then you will find for the plaintiff."

[fol. 140] To the giving of which instruction, requested by plaintiff, after being so modified by the Court, defendant, by its counsel, then and there duly excepted and still excepts.

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY GIVEN

At the instance and request of defendant the Court gave and read to the jury the following instructions, numbered 2, 3, 4 and 5:

2

"You are instructed that the mere fact that plaintiff may have been injured while in the employ of the defendant is not alone sufficient to entitle her to recover in this case, but, on the contrary, in addition to proving that she was injured the burden is upon plaintiff to establish by the greater weight of the evidence that she was injured as the direct and proximate result of some one or more of the acts of negligence alleged in her petition."

3

"The Court instructs the jury that if you find and believe from the evidence that at the time when plaintiff claims to have been injured the defendant was engaged in commerce between different states of the United States, to wit, between the State of Arkansas and the State of Missouri, and that at said time plaintiff was employed by defendant as a station agent at Magness, Arkansas, and that said station was located on defendant's line of railroad between the City of Newport in the State of Arkansas and the City of Joplin [fol. 141] in the State of Missouri, and that the train mentioned in the evidence, to which plaintiff was required to deliver and from which she was required to receive express, mail and messages was a train which was operated and carried passengers and merchandise between said City of Newport, Arkansas, and said City of Joplin, Missouri, then you are instructed that both defendant and the plaintiff were at said time engaged in interstate commerce."

4

"You are further instructed that if you find and believe from the evidence that at the time when plaintiff claims to have been injured she and defendant were engaged in interstate commerce, as defined in other instructions, and if you further find and believe from the evidence that there were certain depressions or uneven places in the platform of defendant's station at Magness, Arkansas, or certain slants or slopes in said platform in which water might accumulate and in which snow, sleet or ice could or did accumulate, and if you further find and believe from the evidence that such conditions had existed for some time prior to the date on which plaintiff claims to have been injured and that during such time plaintiff had been employed by defendant as station agent at said station, and if you further find and believe from the evidence that plaintiff either knew or by the exercise of ordinary care for her safety could have known of such conditions, if any, and if you further find and believe from the evidence that on the occasion of her injury, if any, such conditions, if any, were all open and obvious to plaintiff while passing over said platform and [fol. 142] that the danger of slipping on any ice in or upon

said platform was known to and appreciated by the plaintiff or by the exercise of ordinary care on her part could have been known and appreciated by her, then you are instructed that the plaintiff assumed all risks of injury likely to result therefrom while passing over said platform and is not entitled to recover in this case."

5

"The Court instructs the jury that it was the duty of the plaintiff while in the employ of defendant and especially while proceeding across the station platform to exercise ordinary care for her own safety, and while in this case, even though you should find and believe from the evidence that on the occasion of plaintiff's injury, if any, she failed to exercise ordinary care to see and avoid coming in contact with whatever depression, if any, and with whatever ice, if any, there were in or on said platform, and that such failure on her part, if any, directly caused her to slip and fall, if you so find, such failure can and does not bar her right to recover. Nevertheless, in the event that you find for plaintiff, the damages which you may award to her shall be diminished by you in proportion to the amount of such failure on her part to exercise ordinary care for her safety, if you find she did so fail, as set out herein, attributable to her."

[fol. 143] CHARGE TO JURY

Of its own motion the Court gave and read to the jury the following instructions numbered 6 and 7:

6

"What constitutes 'ordinary care,' as mentioned in these instructions, depends on the facts of each particular case. It is such care as a person of ordinary prudence would exercise (according to the usual and general experience of mankind) in the same situation and circumstances as those of the person or persons in this case with reference to who the term 'ordinary care' is used in these instructions. The omission of such care is negligence in the sense in which that word is used in these instruction."

7

"The Court instructs the jury that nine of your number have the power to find and return a verdict, and if less than the whole of your number, but as many as nine, agree upon a verdict, the same should be returned as the verdict of the jury, in which even all of the jurors who concur in such verdict shall sign the same.

If, however, all of the jurors concur in a verdict, your foreman alone may sign it."

To the giving of which instructions of the Court's own motion, and each of them, defendant, by its counsel, then and there duly excepted and still excepts.

[fol. 144] Defendant's Requested Instruction to Jury Refused

Defendant presented to the Court in writing and requested the Court to give and read to the jury the following instructions numbered 1 and 2:

1

"If you find and believe from the evidence that plaintiff fell while proceeding across the station platform mentioned in the evidence and that the proximate cause of such fall, if any, was her slipping on the ice, which had frozen during the night preceding the accident, then the plaintiff is not entitled to recover and your verdict must be for the defendant."

2

"The Court instructs the jury that if you find and believe from the evidence that there was ice on the station platform mentioned in the evidence and that, in proceeding across said platform, the plaintiff slipped on such ice, if any, and fell, and if you further find and believe from the evidence that such ice, if any, accumulated during the night preceding the date on which plaintiff claims to have been injured, and that it accumulated as the result of rain or sleet falling and freezing during said night, then the

plaintiff is not entitled to recover and your verdict be for the defendant."

Which instructions, and each of them, the Court refused to give and read to the jury; to which action and ruling of the Court in refusing to give and read said instructions to the jury, and each of them, defendant, by its coun-
[fol. 145] sel, then and there duly excepted and still excepts.

VERDICT

Under the instructions of the Court, on the 15th day of November, 1923, at the October Term, 1923, of said court, the jury returned into court the following verdict:

We, the jury in the above cause, find in favor of the plaintiff on the issues herein joined and assess her damages at the sum of twenty-one thousand and five hundred dollars.

Leonard E. Miller, Foreman; W. E. Teigraver, C. C. Hoke, E. L. Carr, Francis O. Pluff, Thos. S. Casey Edw. Schneider, John J. Egan, Mullen Dufford, F. J. Kersting, Louis L. Reiss.

On the 17th day of November, 1923, and during the October, 1923, Term of said court, and within four days after the trial of said cause and the rendition of said verdict, defendant filed its motion for a new trial, which is in words and figures as follows (omitting caption):

[fol. 146] MOTION FOR NEW TRIAL

Now on this 17th day of November, 1923, and during the October, 1923, Term of the Circuit Court City of St. Louis, Missouri, and within four days after the rendition of the verdict of the jury in the above-entitled cause and of the entry of judgment thereon, comes the defendant and moves the Court to set aside said verdict and judgment and to grant it a new trial of the issues herein joined for the following reasons:

I

Because the verdict is against the law.

II

Because the verdict is against the evidence.

III

Because the verdict is against the law and the evidence.

IV

Because the verdict is against the weight of the evidence.

V

Because the Court erred in admitting, over the objection of defendant, incompetent, immaterial and irrelevant testimony offered by the plaintiff.

VI

Because the Court erred in excluding, upon objection of [fol. 147] plaintiff, competent, material and relevant testimony offered by the defendant.

VII

Because the Court erred in refusing the instruction in the nature of a demurrer to the evidence, offered by defendant at the close of plaintiff's evidence, and in not at that time instructing the jury to return a verdict in favor of defendant.

VIII

Because the Court erred in refusing the instruction in the nature of a demurrer to the evidence, offered by defendant at the close of all the evidence, and in not at that time instructing the jury to return a verdict in favor of the defendant.

IX

Because the Court erred in giving and reading to the jury instruction numbered 1 at the instance of plaintiff, the same being an instruction purporting to cover the case for the plaintiff and to submit to the jury plaintiff's theory of lia-

bility and directing a verdict in favor of the plaintiff upon a finding by the jury of the facts therein set forth.

X

Because the Court erred in refusing to give and read to the jury instructions numbered 1 and 2, offered and requested by defendant.

XI

Because the verdict of the jury is excessive and so excessive as to indicate bias, passion and prejudice on the part of the jury towards the defendant. [fol. 148]

XII

Because the verdict of the jury is against the weight of the evidence upon the issue of plaintiff's alleged damage.

XIII

Because the verdict of the jury is for the wrong party.

XIV

Because, upon the whole record, the verdict and judgment should have been in favor of defendant.

XV

Because the Court erred in submitting the case to the jury without giving and reading to the jury an instruction upon the measure of damages.

XVI

Because the jury failed to follow and be guided by the instructions of the Court.

James F. Green, M. U. Hayden, Attorneys for Defendant.

Motion in Arrest of Judgment

On the 17th day of November, 1923, and during the October, 1923, Term of said court, and within four days after the trial of said cause and the rendition of said verdict, de-

[fol. 149] fendant filed its motion in arrest of judgment which is in words and figures as follows (omitting caption):

Now on this 17th day of November, 1923, and during the October, 1923, Term of the Circuit Court, City of St. Louis, Missouri, and within four days after the rendition of the verdict of the jury in the above-entitled cause and of the entry of judgment thereon, comes the defendant and moves the Court to arrest the judgment herein rendered for the following reasons:

I

Because the amended petition of the plaintiff, upon which the cause was tried, does not contain facts sufficient to constitute a cause of action.

II

Because, upon the whole record, the verdict and judgment should be in favor of the defendant.

James F. Green, M. U. Hayden, Attorneys for Defendant.

And thereafter, by order duly entered of record, said motions for a new trial and in arrest of judgment were continued to the December, 1923, Term of said court.

Thereafter, on the 7th day of January, 1924, the Court entered of record the following order:

Order for Remittitur

"If plaintiff within five days enters a remittitur in the sum of six thousand five hundred dollars ($6,500.00) the de- [fol. 150] fendant's motion for a new trial will be overruled, but if plaintiff should elect not to file said remittitur the motion for a new trial will be sustained on account of the verdict being excessive."

Thereafter, on the 11th day of January, 1924, and during the December, 1923, Term of said court, plaintiff filed its memorandum of remittitur in the words and figures as follows (omitting caption):

REMITTITUR

"Now comes Mary I. Aeby, plaintiff in the above entitled cause, personally, and by Abbott, Fauntleroy, Cullen & Edwards, her attorneys, and in obedience to the suggestion and order of the Court heretofore made and entered herein on January 7, 1924, freely here in court, remits to the Missouri Pacific Railroad Company, a corporation, defendant in the above-entitled cause, the sum of six thousand five hundred ($6,500.00) dollars, part and parcel of the damages by the jury assessed and awarded to her by the judgment of the court, and prays judgment for the residue of said damages, to wit, the sum of fifteen thousand ($15,000.00) dollars.

Mary I. Aeby. (Seal.) Abott, Fauntleroy, Cullen & Edwards, Attorneys for Plaintiff.

STATE OF MISSOURI,
City of St. Louis, ss:

On this 9th day of January, 1924, before me personally appeared Mary I. Aeby, to me, known to be the person dedescribed in and who executed the foregoing instrument, and acknowledged that she executed the same as her free [fol. 151] act and deed. In witness whereof I have hereunto set my hand and affixed my official seal this 19th day of January, 1924.

John B. Abbott, Notary Public within and for the City of St. Louis, State of Missouri. My commission expires January 7, 1925."

JUDGMENT

Thereupon, on said 11th day of January, 1924, and during the same December Term, 1924, of said court, the Court set aside the judgment of November 15, 1923, and entered judgment for the plaintiff for $15,000.00; to whom action of the Court defendant then and there duly excepted and saved its exceptions.

Order Overruling Motion for New Trial

On the 14th day of January, 1924, during the December Term, 1923, of said court, by an order duly made and entered of record, the Court overruled defendant's said motion for a new trial; to which action and ruling and order of the Court in overruling said motion for a new trial defendant, by its counsel, then and there duly excepted and still excepts.

Order Overruling Motion in Arrest of Judgment

On the 14th day of January, 1924, during the December Term, 1923, of said court, by an order duly made and entered of record, the Court overruled defendant's said motion in arrest of judgment; to which action and ruling and [fol. 152] order of the Court in overruling said motion in arrest of judgment defendant, by its counsel, then and there duly excepted and still excepts.

Motion for Appeal and Order Allowing Same

On the 26th day of January, 1924, during the December Term, 1923, of said court, defendant filed its affidavit for appeal in said cause in words and figures as follows:

Comes now the defendant in the above entitled cause and prays the Court that said defendant be allowed an appeal in said cause to the Supreme Court of Missouri.

James F. Green, M. U. Hayden, Attorneys for Defendant.

State of Missouri,
City of St. Louis, ss:

M. U. Hayden, being first duly sworn, upon his oath says that he is attorney and agent for the defendant (appellant) in the above entitled cause and makes this affidavit for and on behalf of said defendant (appellant), and affiant further says that the appeal prayed for in said cause is not made for vexation or delay but because affiant believes that ap-

pellant (defendant) is aggrieved by the judgment and decision in said cause.

M. U. Hayden, Attorney and Agent for Appellant.

Subscribed and sworn to before me this 21st day of January, 1924. Geo. W. Collins, Notary Public, St. Louis, Missouri. My commission expires June 28, 1925.

[fol. 153] Whereupon the Court granted defendant an appeal in said cause to the Supreme Court of Missouri.

ORDER SETTLING BILL OF EXCEPTIONS

Inasmuch as the foregoing evidence, proceedings, matters, things, rulings and exceptions do not appear of record, and in order that the same may be made a part of the record in this cause so as to be presented to said Appellate Court, defendant here and now presents this, its bill of exceptions, to the Court and to the Honorable William H. Killoren, Judge of the Circuit Court, City of St. Louis, Missouri, now presiding in Division No. 5 of said Circuit Court, the Honorable Charles B. Davis, Judge presiding in Division No. 5 of said Circuit Court at the time of the trial of said cause and before whom said cause was tried, having resigned as Judge of said Circuit Court and having been succeeded in said division of said court by said Honorable William H. Killoren, Judge as aforesaid, and defendant prays that said bill of exceptions may be settled and allowed, approved, signed, sealed and filed and ordered made a part of the record in this cause; all of which is accordingly done on this 10th day of June, 1925.

Wm. H. Killoren, Judge of the Circuit Court, City of St. Louis, Missouri, presiding in Division No. 5 of said court at the time of the signing of the foregoing bill of exceptions.

O. K. Abbott, Fauntleroy, Cullen & Edwards, Attorneys for Plaintiff.

O. K. M. U. Hayden, Attorney for Defendant.

[fol. 154] Appellant has heretofore filed in this court the transcript required by law, and upon the foregoing record this cause is now pending here.

James F. Green, M. U. Hayden, Attorneys for Appellant.

[fol. 155] Minute entry of argument and submission January 11, 1926, omitted in printing.

[fol. 156] In Supreme Court of Missouri, October Term, 1925

Mary I. Aeby, Respondent,

vs.

Missouri Pacific Railroad Company, Appellant

Appeal from the Circuit Court, City of St. Louis

Judgment—April 5, 1926

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant her costs and charges herein expended and have therefore execution.

(Opinion filed.)

[fol. 157] In Supreme Court of Missouri, Division Number Two

[Title omitted]

Opinion—Filed April 5, 1926

The plaintiff sued the defendant under the Federal Employer's Liability Act for damages for personal injuries sustained by her while employed as station agent at Mag-

ness, Arkansas. The jury returned a verdict assessing the plaintiff's damages at $21,500. Plaintiff, at the suggestion of the court, remitted $6,500 and judgment was rendered for plaintiff for $15,000, and the defendant appealed. The evidence for the plaintiff is that she entered the employ of the defendant as a ticket agent at its station at Morefield, Arkansas, a station between Batesville and Magness, on March 20, 1919, and worked there in that capacity until July 2, 1919, when she began work for the defendant as station agent at Magness, a village having a population of about 400, during the absence of the regular agent, Mr. Eden, and served there in that capacity until a few days [fol. 158] after she sustained her injuries on January 13, 1921, when Mr. Eden reported for duty. There were four passenger trains passing Magness daily, which were engaged in interstate commerce. The station, a one-story building, 16 x 48 feet, faces to the north. The platform, 10 feet wide and 300 feet long, between the station and the railroad track, was constructed of loose chat or small broken stones, laid on the surface of the ground. It is a foot higher at its north side than at the station. There were no gutters on the eaves of the roof of the station building, so that rain ran off the roof to the platform, which drained to the west, wearing a channel in the chat along the north side of the building and in front of the steps at the door into the waiting room, which door is at the west end of the station. When plaintiff was employed as station agent at Magness there was a depression about four feet square and three or four inches deep at the steps in front of this door, caused by the tramping of persons going in and out of the station and by the water running in front of the door. This depression was probably a little larger and deeper on January 13th than in the previous July. There were a few other depressions or holes in the platform. Rain would collect and form puddles of water in these holes or depressions, which would gradually run away or be absorbed. During plaintiff's employment at Magness, there had been no hard, freezing weather and she had not observed ice in these depressions. It was plaintiff's duty as station agent to do book work, sell tickets to passengers and handle the express, baggage and freight work. The petition and answer aver that the plaintiff and the de-

fendant were each engaged in interstate commerce and it is averred in the answer that the particular train men-
[fol. 159] tioned in plaintiff's petition, to which she was "required to deliver and from which she was required to receive express, mail and messages," was a train which was operated by defendant and carried passengers and merchandise between the City of Newport, Arkansas, and the City of Joplin, Missouri. The suggestion of, or the making of, repairs in or about the station or the platform did not fall within the line of plaintiff's duties; such matters pertained to the duties of the section foreman or his superiors.

When plaintiff and her friend, Miss Fugett, retired on the evening of January 12, 1921 (plaintiff then lived in the station), the station platform was dry. There was a northbound passenger train scheduled to pass the station at 6:18 A. M. When plaintiff and Miss Fugett, at about 6:10 A. M., started out of the station to place the truck to receive the mail, baggage and express, it was dark and there were no lights on the platform; it had rained in the night and two or three inches of snow had fallen. The rain had filled these depressions and frozen. The ice in the hole in front of the door referred to was rough and uneven, but plaintiff did not know, nor did it occur to her that there was or might be ice in these holes under the snow. She stepped off the west end of the steps at the door, got the truck, which was covered with ice, at the west end of the platform, placed it conveniently for the reception of mail, baggage and express from the train and then started to return to the station. She tripped, slipped and fell heavily on the rough and uneven ice under the snow at the door steps and sustained serious internal injuries. There was evidence that puddles of water in this platform had frozen before plaintiff was employed as station agent at Magness. Par-
[fol. 160] ticulars as to the nature and extent of plaintiff's injuries will be given in the opinion. At the close of the case the court overruled a demurrer to the evidence.

1. It is insisted that the petition does not state facts sufficient to constitute a cause of action, because it fails to allege that the defendant either knew or by the exercise of ordinary care could have known of the alleged negligent

conditions, or that they had existed for a sufficient length of time to enable defendant, by the exercise of ordinary care to have discovered and remedied them.

The petition alleges that at the time of plaintiff's injury, and for a long time prior thereto, the surface of the platform was composed of chat and fine gravel so loosely put together that depressions, holes or drains were formed in it; that the platform and station were so negligently constructed that the platform sloped towards the door of the station and the station had no gutters on the eaves of its roof; that a depression formed in front of the door to the station; that the chat or gravel was carried away from in front of said door by persons passing in and out of the station and the water falling on the station and on the platform flowed towards this depression forming a ditch, and that in cold weather, when rain, snow and sleet fell, ice formed in this ditch and depression, and formed a slick, ice-covered and irregular surface, rendering it unsafe and dangerous for a person to step into or upon; that when plaintiff slipped and fell, the depot platform was dark and unlighted and that she had no knowledge that said platform was in said dangerous and unsafe condition, nor could she have nowledge of such fact by the exercise of ordinary care, etc.

[fol. 161] "Where it appears from the complaint that the defect is a defect of construction, the authorities do not require an allegation of the employer's knowledge of the defect." 6 Thompson's Comm. on the Law of Negligence, (2 Ed.) 533.

"Where the defect in an appliance is shown to be structural and of such a character as renders it unsafe it may be inferred that the employer was aware of the defect and an employee who has been injured by such an appliance need not show that the master knew it was defective." 26 Cyc. 1144 and cases cited in note 86.

In Dietzman v. St. Louis Screw Company, 300 Mo. 196, 210, 254 S. W. 59, Judge Graves said:

"Nor is there question as to the fact that defendant knew of the situation in ample time to have remedied it before the accident. In fact, it constructed the place, and when it made it a working place was bound to know its condition."

Elliott v. Payne, 293 Mo. 581, 239 S. W. 851, was an action based on the Federal Employers' Liability Act for the death of a locomotive fireman charged to have been caused by a defective platform. Judge Graves said:

"Plaintiff had evidence tending to show that at places the bricks were lower than the curbing, and this condition permitted the accumulation of water and ice. Whether the defects were in the original construction or appeared later by reason of use and the sinking of the bricks into the base upon which they were placed can make no material difference. The charge in the petition is that the defendant maintained the platform in a defective condition."

[fol. 162] In Sankey v. Chicago etc. Ry. Co., 118 Iowa 39, 91 N. W., l. c. 821, the Court said:

"It is first urged that defendant cannot be held negligent because of the presence or accumulation of ice and snow upon its tracks and yards. Within certain limitations, this is the correct doctrine. Climatic conditions—heat, cold, rain, snow and ice—are beyond the control of the employer, and the mere fact of their existence or occurrence does not tend to negative the exercise of reasonable care. But it does not follow that a case cannot arise where the presence or existence of some of these elements is so combined with want of reasonable care by a railroad company in the maintenance of its tracks and yards as to create a danger which is not naturally or necessarily incident to a brakeman's labor. The work of coupling and uncoupling cars, making up trains, taking and discharging freight, opening and closing switches is done almost exclusively within the yard limits of the stations along the line of road, and, within reasonable limits, the obligation of the master to furnish his servant a safe place in which to work applies to these yards as imperatively as to the repair shops or to the general offices of the company."

See, also, Gibson v. Railroad, 115 Minn. 147, 131 N. W. 1057; Keitel v. St. Louis Cable Company, 28 Mo. App. 657, and Combs v. City of Kirksville, 134 Mo. App. 645, 114 S. W. 1153.

Reasonable and ordinary care must be determined in the light of the dangers to be reasonably anticipated. The

defendant must be presumed to know that many persons would pass over this platform and that holes or depressions would form in the loose chat or broken pieces of stone of [fol. 163] which it was formed, particularly in front of the door to the waiting room; that rain would fill such holes with pools of water; that in the winter season these pools of water would freeze and were likely to be covered with snow and become unsafe for persons walking on the platform. In the exercise of ordinary care the defendant was bound to anticipate and make reasonable provisions for such contingencies, "for what a man knows and should know are equivalent in law" (Benton v. St. Louis, 248 Mo. 98, 109, 154 S. W. 473; Schiller v. Kansas City Breweries Company, 156 Mo. App. 569, 577, 137 S. W. 607; Johnson v. Railroad, 164 Mo. App. 600, 622, 147 S. W. 529; Bowen v. Ry Co., 95 Mo. 268, 275, 8 S. W. 230; Beane v. City of St. Joseph [Mo.], 256 S. W. 1093, 1095; Merritt v. Telephone Co., 215 Mo. 299, 310, 115 S. W. 19; Smith v. City of St. Joseph, 42 Mo. App. 392, 398; Heether v. Huntsville, 121 Mo. App. 495, 499, 97 S. W. 239; 3 La Batt, Master and Servant [2 Ed.] 2750). The contention is devoid of merit.

2. It is insisted that the allegations of the petition do not bring the case within the provisions of the Federal Employers' Liability Act, as there is no averment that plaintiff was injured through the negligence of any officer, agent or employe of the defendant, or that her injury was due to any defect or insufficiency in any of the appliances or equipment specified in the act.

The Act (U. S. Comp. Stat. 1913, Secs. 8657-65) reads in part:

"That every common carrier by railroad, while engaged in commerce between any of the several states or territories, etc., shall be liable in damages to any person suffering in- [fol. 164] jury while he is employed by such carrier in such commerce * * * for such injury, or death, resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

It is insisted that a station platform does not come within any of the appliances or equipment mentioned in the act. The act is remedial and should receive a liberal interpretation. From the general and comprehensive terms employed it would seem to have been the intention of the framers of the act to extend its protection to an employe suffering an injury in the circumstances of the case in hand. A careful reading of the act does not incline us to the conclusion that the plaintiff's cause of action is a casus omissus. While the station platform may not be embraced within the other words of the act, it would seem that the general term "works" is sufficiently comprehensive.

This term is thus defined in Webster's New International Dictionary: "A place where industrial labor of any kind is carried on."

This question was considered in Elliott v. Payne, supra, and it was held that a depot platform is not the working place of a locomotive fireman. Judge Graves said (594):

"Those employes whose duties require them to unload passengers, baggage or freight might say that it was a working place, but to other employes it would be a mere way of ingress and egress. Deceased was not in an em- [fol. 165] ployment which required him to use the platform as a working place."

We have seen that the defendant's answer avers plaintiff's duties required her to deliver to and receive baggage, mail, express and messages from this particular train.

In appellant's statement learned counsel say:

"A part of her (plaintiff's) duties consisted of operating the truck maintained at the station in the handling of express, baggage and mail. It was respondent's duty to meet all trains."

It is clear therefore, on principle and authority, that this platform was the plaintiff's working place while she was engaged in the performance of those duties and that it was the duty of the defendant to exercise reasonable and ordinary care to keep and maintain it in a reasonably safe condition for the performance of plaintiff's duties hereon, and

that the petition stated facts sufficient to constitute a cause of action under the act in question.

3. We have briefly summarized the evidence adduced by the plaintiff and are of the opinion that it is sufficient to support the verdict, and that the Court properly overruled the demurrer offered at the close of the case.

4. It is appellant's contention that the plaintiff assumed the risks of injury resulting from the conditions prevailing at the time and place of the accident.

The testimony is clear that plaintiff had nothing to do with the repair of the station platform. Such repairs were made by the section men under the supervision of the section foreman. Appellant's witness Eden, who was em- [fol. 166] ployed as station agent at Magness before and after the plaintiff served there in that capacity, testified that it was the duty of the section foreman to observe the condition of things at the station once a day. The evidence tends to show that the defendant was negligent in the construction and maintenance of the platform and that such negligence was the proximate cause of plaintiff's injuries. "The rule is firmly established in this state that the servant never assumes a risk of injury created by the negligence of the master (Jewell v. Bolt and Nut Co., 231 Mo. 176, 132 S. W. 703; George v. Railroad, 225 Mo. 364; Schultz v. Railway, 145 Mo. App. 262; Schiller v. Breweries Co., 156 Mo. App. 569, 578, 137 S. W. 607)."

Plaintiff did not know or apprehend there was ice in the depression under the snow, nor did she appreciate the danger of stepping thereon nor assume the risk of doing so.

In Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492, 34 S. C. Rep. 635, 640, the Court said:

"But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect of disrepair and of the risk arising from it, unless the defect and risk alike are so obvious that an ordinary prudent person under the circumstances would have observed and appreciated them. These distinctions

have been recognized and applied in numerous decisions of this Court (cases cited)."

[fol. 167] In McIntyre v. Railway Co., 286 Mo., 234, 256, 227 S. W. 234, we said:

"The federal courts in cases arising under the Federal Employers' Liability Act hold that an employe in entering upon a contract of employment assumes all the risks and dangers ordinarily incident to his employment and risks caused by the employer's negligence which are obvious and fully known to the employe and appreciated by him, or so plainly observable that he must be presumed to know them (citing cases). But he is not obliged to use even ordinary care in discovering dangerous defects. Knowledge will not be imputed to him unless the defects are plainly observable (citing cases)."

The Court gave the following instructions for the plaintiff:

"The Court instructs the jury that if you believe and find from the evidence that on and prior to January 13th, 1921, the plaintiff was in the employ of the defendant as station agent at its station in Magness, Arkansas;

"And that the defendant maintained between its said station and its rails a platform, and that it was plaintiff's duty to pass over and along said platform and deliver to and receive from passing trains express, mail and other things carried by defendant, and to place a truck in position for receipt of same from defendant's trains;

"And if you believe that defendant's platform had been so hollowed out and worn away in front of the station door that a depression formed in front of said door in which water, falling on the roof of defendant's station and flowing over its platform, accumulated therein;

"And if you believe that on the night of the 13th of Janu- [fol. 168] ary, 1921, it rained, and that the rain, falling on the roof of defendant's station and on its platform, flowed into the depression in front of said depot door and formed a slick, ice-covered irregular surface therein, and that same was at the times mentioned in the evidence covered with snow, and that said platform at that point was not level, but

slanted towards the depression; and if you further believe that sleet and snow fell upon said ice, if such you find, and thereby formed a slick and slippery surface in front of said station door which rendered said station platform not reasonably safe for a person to walk upon and pass over;

"And if you further believe that the climatic conditions in and around Magness, Arkansas, at that season of the year were such that the defendant, as a reasonably prudent railroad operator, could reasonably have anticipated that rain, sleet and ice would fall and accumulate in said depression, and after so accumulating, was likely to freeze and thereby form a slick and slippery and irregular surface, unsafe for persons to pass over;

"And if you further believe that the plaintiff fell and was injured while in the course of her employment and in the act of passing over defendant's platform into defendant's station because of and on account of the slick and slippery irregular slanting surface (if you so find the fact to be) in front of said station; and if you further find and believe from the evidence that no freeze had theretofore taken place while she was in Magness;

"And if you further believe that the defendant could, by the exercise of ordinary care, have erected and maintained said station platform so as to prevent it from becoming unsafe (if you find it was unsafe) in rainy and freezing [fol. 169] weather, and that the defendant negligently failed to so erect and maintain its platform; and if you find that plaintiff did not assume the risk of injury as explained in other instructions, then you will find for the plaintiff."

The Court also gave instructions 2, 3, 4 and 5 for the defendant, as follows:

2. "You are instructed that the mere fact that plaintiff may have been injured while in the employ of the defendant is not alone sufficient to entitle her to recover in this case, but, on the contrary, in addition to proving that she was injured the burden is upon plaintiff to establish by the greater weight of the evidence that she was injured as the direct and proximate result of some one or more of the acts of negligence alleged in her petition."

3. "The Court instructs the jury that if you find and believe from the evidence that at the time when plaintiff claims to have been injured the defendant was engaged in commerce between different states of the United States, to wit, between the State of Arkansas and the State of Missouri, and that at said time plaintiff was employed by defendant as a station agent at Magness, Arkansas, and that said station was located on defendant's line of railroad between the City of New Port, in the State of Arkansas, and the City of Joplin, in the State of Missouri, and that the train mentioned in the evidence, to which plaintiff was required to deliver and from which she was required to receive express, mail and messages was a train which was operated and carried passengers and merchandise between said City of Newport, Arkansas, and said City of Joplin, Missouri, then you are instructed that both defendant and the plaintiff were at said time engaged in interstate commerce."

[fol. 170] 4. "You are further instructed that if you find and believe from the evidence that at the time when plaintiff claims to have been injured she and defendant were engaged in interstate commerce, as defined in other instructions, and if you further find and believe from the evidence that there were certain depressions or uneven places in the platform of defendant's station at Magness, Arkansas, or certain slants or slopes in said platform in which water might accumulate and in which snow, sleet or ice could or did accumulate, and if you further find and believe from the evidence that such conditions had existed for some time prior to the date on which plaintiff claims to have been injured, and that during such time plaintiff had been employed by defendant as station agent at said station, and if you further find and believe from the evidence that plaintiff either knew or by the exercise of ordinary care for her safety could have known of such conditions, if any, and if you further find and believe from the evidence that on the occasion of her injury, if any, such conditions, if any, were all open and obvious to plaintiff while passing over said platform, and that the danger of slipping on any ice in or upon said platform was known to and appreciated by the plaintiff or by the exercise of ordinary care on her part

could have been known and appreciated by her, then you are instructed that the plaintiff assumed all risks of injury likely to result therefrom while passing over said platform and is not entitled to recover in this case."

5. "The Court instructs the jury that it was the duty of the plaintiff while in the employ of defendant and especially while proceeding across the station platform to exercise ordinary care for her own safety, and while in this case, even though you should find and believe from the evidence [fol. 171] that on the occasion of plaintiff's injury, if any, she failed to exercise ordinary care to see and avoid coming in contact with whatever depression, if any, and with whatever ice, if any, there were in or on said platform, and that such failure on her part, if any, directly caused her to slip and fall, if you so find, such failure can and does not bar her right to recover. Nevertheless, in the event that you find for plaintiff, the damages which you may award to her shall be diminished by you in proportion to the amount of such failure on her part to exercise ordinary care for her safety, if you find she did so fail, as set out herein, attributable to her."

These instructions were very favorable to the defendant and in fact put an unnecessary burden on plaintiff. Instruction 4 required her to exercise ordinary care to discover the dangerous conditions mentioned in the instruction. This requirement is in conflict with the McIntyre and other cases cited supra. Under the instructions the jury found that plaintiff did not assume the risk and hazard of slipping and falling on the ice while in the discharge of her duties. Other instructions asked by the defendant on assumption of risk were properly refused.

5. Appellant complains that plaintiff's instruction authorized the jury to consider facts not proven, and assumed as true facts which were controverted, and broadened the averments of the petition or the scope of the evidence. Appellant says: :

1. There was no evidence that the platform had been so hollowed out and worn away in front of the station door that a depression formed there in which water accumulated.

2. The jury was not required to find that the alleged [fol. 172] negligent condition was known to defendant or had existed long enough that appellant knew, or by the exercise of ordinary care would have known of its existence.

3. There was no evidence that the climatic conditions were such that a reasonably prudent railroad operator could reasonably have anticipated that rain, sleet and ice would fall and accumulate and freeze, etc.

There was ample evidence that the depression had worn and formed in front of the door of the station and that it was there when plaintiff was employed as station agent at Magness. The second proposition we have already considered. There was ample evidence as to the climatic conditions at Magness. The rain filled these holes or depressions; the water did freeze and snow fell and covered the ice. There is no contention that this was unusual or phenomenal; in fact, there was proof that ice had theretofore formed in holes in this platform. Several witnesses referred incidentally to rain, snow and ice at Magness in the winter season. It is a matter of common knowledge that climatic conditions of this character may be anticipated in the month of January in the northern part of Arkansas (Christy v. Wabash Ry. Co., 195 Mo. App. 232, 241, 191 S. W. 241; 23 C. J. 140, Sec. 1964). There is no merit in these contentions. This question was submitted by defendant's instruction 4.

6. Appellant's learned counsel insist that plaintiff's injury was due solely to her own negligence, both before and at the time of the accident. The theory is, plaintiff knew or should have known rain had filled the holes in the platform and had frozen and that she failed to exercise ordinary care for her safety. Appellant's fifth instruction is [fol. 173] opposed to and forecloses this contention; it is there declared that if plaintiff failed to exercise ordinary care to see and avoid ice on the platform and that such failure directly caused her to slip and fall, such failure is not a bar to a recovery, but the damages, if any, which may be awarded to her, shall be diminished in proportion to the amount of such failure on her part to exercise ordinary care for her safety.

Under the federal act, on which this action is based, contributory negligence of the employe is not a bar to an action for damages.

In Great Northern Railway Company v. Wiles, Administrator, 240 U. S. 444, 36 S. C. Rep. 406, a rear brakeman of a parted freight train, disregarding his duty to protect the rear of the train by going back and giving signals which the rules required, remained in the caboose and was killed by a passenger train, which he knew was closely following, and ran into the caboose. It was held that the brakeman's disobedience of the rule was the causal negligence, there being no claim that the passenger train was negligently run. Davis v. Kennedy, 226 U. S. 147, and Freese v. Railway Co., are also cited, but they are not in point.

7. Appellant insists the verdict is excessive. Plaintiff was hurt on January 13, 1921; prior to that time she enjoyed good health; the suit was brought November 17, 1922; the trial was on November 14, 1923, two years and ten months after the date of the injury. he was in the Missouri Pacific hospitals fifteen months at the defendant's expense, and under the care of the defendant's physicians altogether for a period of eighteen months. While in the hospitals she was confined to her bed and suffering pain nearly all the time. She suffered from a uterine hemorrhage from the [fol. 174] time of her fall until the trial; spells of weakness, fainting spells, nervousness and insomnia, and a backward displacement of the uterus. On June 21, 1921, she had her appendix and right ovary removed and the ligaments shortened and curetted. There was evidence that her injuries resulted from her fall. She was earning from $150 to $165 per month prior to the time of her accident. Between December 7, 1922, and November 13, 1923, the date of the trial, plaintiff worked altogether for about four and a half months at reduced wages. During this time she had uterine hemorrhages and ran a temperature nearly all the time. She testified that her nervous condition and physical weakness made it almost impossible for her to work. At the time of the trial she was single and unmarried and thirty-six years of age. She had then lost about $5,000 in wages.

Plaintiff's injuries are in some respects similar to those sustained by the plaintiff in Brickell v. Flemming et al., — S. W. —, except that Mrs. Brickell suffered a disfiguring scar on her cheek. In that case a verdict for $18,000 was affirmed. In Barr v. Kansas City, 121 Mo. 22, 33, 25 S. W. 562, it was said that, "Injuries of the character disclosed * * * are far more serious than the loss of a limb, without internal injuries." A verdict for $10,000 was sustained. In Evans v. General Explosives Company, a verdict for $20,000 for the loss of an arm, torn off at the shoulder, was held not excessive. See Mayme v. K. C. Railway Co., 229 S. W. 386. In Caldwell v. Payne, 246 S. W. 312, it was held, in banc, that $15,000 for the loss of an arm below the elbow by a railroad engineer, aged forty, was not excessive. In this class of cases "the amount of the award rests largely [fol. 175 & 176] within the discretion of the jury." (17 C. J. 870.) We see nothing in the circumstances of this case to warrant us in requiring a remittitur.

The judgment is therefore affirmed. All concur.

Edward Higbee, C.

Railey, C., not sitting.

Per Curiam:

The foregoing opinion of Higbee, C., is hereby adopted as the opinion of the Court. All concur.

Clerk's certificate to foregoing paper omitted in printing.

[fols. 177-180] Motion for rehearing, covering four pages, filed April 14, 1926, omitted from this print. It was denied and nothing more by order May 28, 1926.

[fol. 181] In Supreme Court of Missouri, Division No. 2

[Title omitted]

Motion to Tranfer Cause to Court en Banc—Filed April 14, 1926

Now comes Missouri Pacific Railroad Company, appellant in the above cause, and moves the Court to transfer this cause to the Court en Banc for further consideration and decision, for the following reasons:

I

Because the opinion in the case is opposed to the decision of Division No. 1 in the case of Elliott vs. Payne, 293 Mo. 581.

II

Because a Federal question is involved in the cause, to-wit, the proper construction to be given to the Act of Congress of April 22, 1908, 65 U. S. Compiled Statutes 1913, [fol. 182 & 183] Section 8657, and therefore, under the provisions of Section 4 of the Amendment to the Constitution of Missouri, adopted in the year 1890, appellant is entitled to have said cause transferred to the Court en Banc for its decision.

James F. Green, M. U. Hayden, Attorneys for Appellant.

[fol. 184] In Supreme Court of Missouri

[Title omitted]

Order Overruling Motion for Rehearing—May 28, 1926

Now, at this day, the Court, having considered the motion of the said appellant for a rehearing herein, doth order that the said motion be, and the same is hereby, overruled.

IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OVERRULING MOTION TO TRANSFER TO COURT EN BANC—May 28, 1926

Now, at this day, the Court, having considered the motion of the said appellant to transfer this cause to the Court en Banc, doth order that the said motion be, and the same is hereby, overruled.

[fol. 185] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 186] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 25, 1926

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri, is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U. S.
FILED
JUL 31 1926
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 100

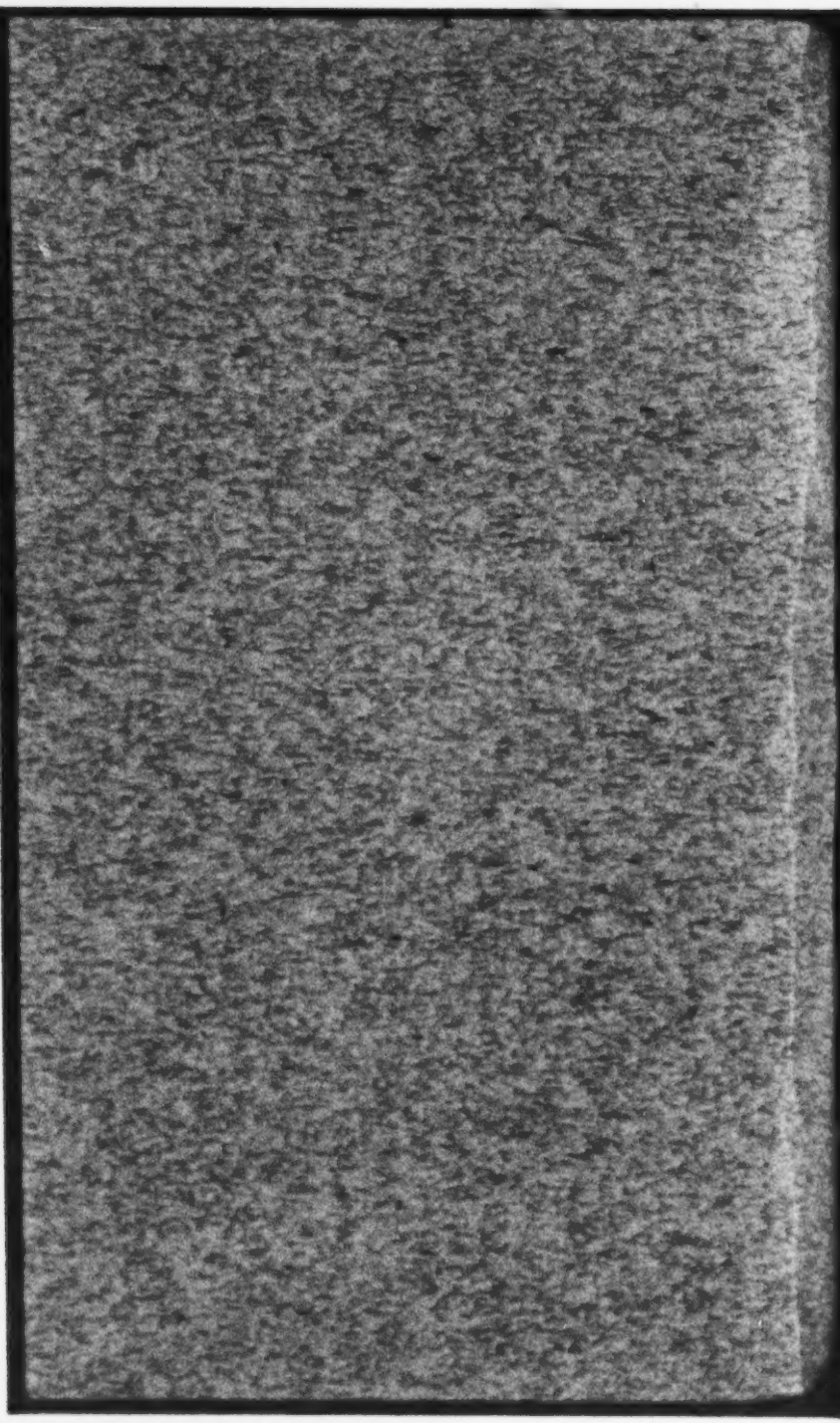
MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

MARY I. ABBY, Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

EDWARD J. WHITE,
JAMES F. GREEN,
MERRITT H. HAYDEN,
Attorneys for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No.

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,

vs.

MARY I. AEBY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, Missouri Pacific Railroad Company, presents this its petition and prays that a writ of certiorari may be granted, directing the Supreme Court of the State of Missouri to certify to this Honorable Court for its review and determination the case of Mary I. Aeby, respondent, *v.* Missouri Pacific Railroad Company, appellant, being cause No. 25385 of the October, 1925, term—1926 call—of said Supreme Court,

and for reasons of this application and petition your petitioner respectfully shows to this Court that on the 17th day of November, 1922, Mary I. Aeby, a resident of the State of Arkansas, instituted this suit in the Circuit Court, City of St. Louis, Missouri, against your petitioner, wherein she sued for damages for personal injuries alleged to have been sustained by her while in the employ of your petitioner as a station agent at the village of Magness, in said State of Arkansas.

During the pendency of said suit in the Circuit Court, City of St. Louis, Missouri, respondent filed an amended petition alleging that at all times mentioned therein your petitioner was engaged in commerce between different States of the United States, and that at the time of her injury she was employed by petitioner in interstate commerce. It was then alleged that on and prior to the 13th day of January, 1921, respondent was employed at Magness, Ark., as station agent for your petitioner; that it was her duty to go from the station to the trains for the purpose of carrying on the business of petitioner, and that in doing so she was required to pass over a platform extending from the station building to the tracks of your petitioner; that on said 13th day of January, 1921, in the early morning, before it was fully light, she delivered to a certain train and received from said train express, mail, and messages, and while returning from said train to the station she fell upon the platform.

It was further alleged in said petition that your petitioner was guilty of negligence, in that:

(1) Said station platform was not lighted.

(2) Said platform was covered with snow, sleet, and ice and was so slick that one was liable to slip thereon, and was not level.

(3) That the surface of said platform was composed of chat and fine gravel, so loosely put together that depressions, holes, and drains would form in it, leaving the surface uneven, slanting, and with ridges and irregular places appearing thereon.

(4) That petitioner did not maintain troughs or gutters on its depot building, but allowed the water falling on the roof of said building to fall on the chat or gravel platform in front of the door and caused said chat and gravel to become loose, so that a depression like a gully or trough formed in front of the depot door.

(5) That the water falling on said depot and said platform flowed toward the depression in front of said door and cut a depression or ditch in front of said door and around the corner of said depot, which ditch or depression had sharp, slanting sides, and also slanted downward toward the end of the depot, and that in cold weather, when rain, snow, and sleet fell, ice formed in the bottom and on the sides of said ditch or depression and formed a slick, ice-covered, and irregular surface, rendering it dangerous for a person to step into or upon said ditch or its sides.

It was further averred in said petition that at the time of her injury the depot platform was dark and unlighted, and that respondent had no knowledge that said depot platform was in the unsafe and dangerous condition aforesaid, nor could she have knowledge of such fact by the exercise of ordinary care, and that in passing over said platform on said date she stepped upon and into said ditch or depression and upon the irregular surface of same, which was then covered by a coating of ice, snow, and sleet, and fell violently to the platform, resulting in the injuries complained of.

Answer of Petitioner.

Your petitioner further shows that it filed an answer to respondent's said petition admitting that petitioner was engaged in commerce between the different States of the United States, and that respondent was employed by petitioner in interstate commerce. All other allegations of the petition were put in issue by a general denial thereof. The answer further pleaded contributory negligence on the part of respondent, and, further, that all of the conditions existing at said station and in and upon said station platform with respect to either light or lack of light, to the alleged depression or ditch in said platform, and the alleged slant in the sides thereof, and with respect to the snow, sleet, or ice, if any, thereon, as well as whatever dangers, if any, existed as the result of said alleged conditions, were open and obvious to any one, and especially respondent, while passing

over said platform, and were either known to and appreciated by respondent, or by the exercise of ordinary care on her part could have been known to and appreciated by her, for which reason it was further averred that respondent assumed the risk of injury incidental thereto or likely to result therefrom.

Your petitioner further shows that upon the trial of said cause respondent recovered a judgment in the sum of fifteen thousand dollars ($15,000), from which an appeal was taken to the Supreme Court of the State of Missouri; that on the 11th day of January, 1926, said cause was argued and submitted to said supreme court; that on the 5th day of April, 1926, said supreme court handed down its decision in said cause, affirming the judgment of the trial court (Rec., p. 157 and pp. 157-171); that thereafter, and within the time provided by the rules of said court therefor, and on the 14th day of April, 1926, your petitioner filed therein its motion for a rehearing of said cause (Rec., pp. 172-173); that on the 28th day of May, 1926, said motion for rehearing was by the Supreme Court of Missouri, by order duly entered of record, overruled, whereupon said judgment became final (Rec., p. 175), and that this application is filed and made to this Court within three months after the entry of said final judgment.

Your petitioner further shows that the Supreme Court of Missouri consists of two divisions; that said cause was heard and decided by Division No. 2 of said court, and that after the decision of said court affirming the judgment of the trial court and on, to wit, the 14th day of April, 1926, your petitioner filed in said

court its motion for a transfer of said cause to the Supreme Court of Missouri *en banc*, in order, if possible, that said cause might be determined by all of the judges comprising both divisions of said Supreme Court of Missouri (Rec., p. 174), and that on the 28th day of May, 1926, your petitioner's said motion to transfer said cause to the court *en banc* was by order of court duly entered of record, overruled (Rec., p. 175), and petitioner states that there is no other proceeding, under the laws of Missouri or under the rules of said supreme court, of which petitioner can take advantage for a further consideration of this case by said court, and this judgment is now final.

Your petitioner attaches to and files with this application a certified transcript of the proceedings had in said Supreme Court of Missouri and a certified copy of the abstract of the record in said court.

Your petitioner also files herewith and respectfully asks to have considered in connection with this application, as if included herein, a brief in support thereof.

Your petitioner further shows that the facts upon which it relies in this application are all established by the uncontroverted testimony of respondent.

At the time of her injuries she was about 34 years of age. She had lived during most of her life within 20 miles of the station on your petitioner's line of railroad known as Magness, Ark. She first entered the employ of your petitioner as ticket agent at Morefield on March 20, 1919, or nearly two years prior to her injury, where she worked until July 2, 1920, when she

began work for petitioner as station agent at Magness, Ark., a town of 400 people (Rec., p. 17).

Her duties as station agent at Magness were to do the book work, sell tickets, and handle the express and freight work (Rec., p. 17). At the time of her injury, there were four trains which passed that station. One passenger train passed there, northbound, at 6:18 in the morning and one passenger train, southbound, at 6:41 in the evening; then at 8:50 in the morning and at 12:38 p. m. there were two local, or mixed, trains (Rec., p. 18).

The station-house proper at this place was a small wooden building, various pictures of which appear in the record. The station platform was composed of chat or small gravel. There was evidence tending to establish that when it rained the rain, falling from the roof of the station and "the passage of people in and out of the station," would cause a depression, or small ditch or drain to wear in the chat comprising the platform (Rec., p. 19); that this ditch or depression extended across that part of the platform in front of the door leading into the station (Rec., p. 19). A reference to the pictures appearing in the record at pages 128 and 129 will show a projection built over the top of the door leading to the station, and also, immediately in front of the steps to the doorway, will be seen some boards, which are referred to in the record as a grain door (Rec., p. 113). These boards are laid over that portion of the platform where it is contended the depression, or ditch, formed. The grain door was laid in the position shown in the exhibit some time after this

accident, and the projection at the top of the door was placed there some time after the accident (Rec., p. 114).

The condition with reference to the falling of rain from the roof of the station and with reference to the wearing in the chat platform of this depression or ditch existed whenever it rained, from the time when respondent began work at this station, on July 2, 1920, until the date of her injury, in January, 1921 (Rec., pp. 55 and 70). During that time respondent was practically in sole charge at this station (Rec., p. 71).

When she first entered the service at this place, respondent had a caretaker by the name of Puckett, who was to assist her at the station. She discharged Puckett on orders of the superintendent in August, 1920, and employed one Garner, who was to receive the sum of $75 a month as caretaker, but respondent carried Garner's name as helper and did his work herself and received his pay (Rec., p. 34). During the time that she was employed at this station prior to her injury respondent observed that when rain fell from the roof of the station it would first make a ditch or depression in front of the station, and that later the chat would absorb the water or it would run away. She had often noticed that condition (Rec., p. 35). She kept a book in which she entered a record of weather conditions at that station while she worked there (Rec., pp. 36 and 37).

Your petitioner further shows that on the night preceding her injury respondent met the train, southbound, due at Magness at 6:41 p. m.; that she received

the mail from that train and took it to the village post office; that thereafter she returned to the station, where she remained all night (Rec., pp. 37-38); that at the time that she returned to the station the platform was perfectly dry and there was no accumulation of either water, snow, or ice thereon (Rec., p. 38); that during the night it first rained, then sleeted, and then snowed (Rec., p. 38); that she arose the next morning and stepped out of the station and proceeded to pull the truck from its position at one end of the station out to the edge of the platform next to the railroad track preparatory to meeting the train due there at 6:18; that she knew that it had sleeted during the night; that she knew there was snow all over the platform and all over the village as far as could be seen from the station as soon as she stepped out of the station and before she was injured (Rec., pp. 39 and 40); that when she attempted to move the truck she discovered that it was covered with sleet, and that there had been freezing weather during the night (Rec., p. 52); that she pulled the truck out to the edge of the platform and placed it in its proper position without any mishap, and while walking from the edge of the platform back to the station and when she had reached a point near the steps leading to the station, she slipped on the side of the depression and on the snow or ice which was in the depression and which had accumulated during the night, and fell, sustaining the injuries of which she complains (Rec., p. 47).

The testimony of respondent established that during all the time that she was moving the truck and walking

across the platform she walked on snow, and that she knew that the platform was covered with snow (Rec., pp. 39 and 40).

The testimony of respondent, found on pages of the record already referred to, establishes that she was of full age and experience; that she worked at this station from July 2, 1920, to January 13, 1921; that the construction of the roof of the station and of the platform was exactly the same on the date of her injury as it was when she began work there; that all of the conditions of the platform with respect to the depression made by the rain falling from the roof, and of people passing in and out of the depot, and with the exception of the presence of snow and ice therein, were the same at the time of her injury as they were when she began work at this station; that many times prior to this date when it rained she had observed that a depression would form, and that water would first accumulate therein and be later absorbed by the chat. She was thoroughly familiar with these facts. She knew that on the night preceding her injury there was no accumulation of water, snow, or ice on this platform, but, on the contrary, it was perfectly dry at as late as nine or ten o'clock on that night. She knew before she stepped out of the station in the morning that it had rained during the night. She knew when she stepped out of the station that the steps and platform and the entire village were covered by snow. She knew when she first attempted to move the truck, which was before her injury, that it had sleeted during the night; that the water which had fallen had frozen, and that the

depression in which, first, the water had frozen and, later, the ice had formed was some two to four feet square and two or three inches deep (Rec., p. 68).

Your petitioner further shows that by the pleadings and the testimony in said cause there were, and are, presented, among others, three principal questions, all arising under the act of Congress known as the Federal Employers' Liability Act, namely:

First. Whether the allegations in respondent's petition and the facts established by the testimony bring the case within the provisions of the Federal Employers' Liability Act, more particularly whether a station platform is embraced within that portion of said act which provides for the recovery of damages for injuries resulting, in whole or in part, from a defect or insufficiency due to the negligence of the carrier in its "cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Second. Whether respondent assumed the risk of injuries likely to arise from the conditions existing at the time and place of her injury as herein set forth.

Third. Whether the injuries sustained by respondent were solely due to her own primary negligence—not to her contributory negligence.

Your petitioner further shows that the accident which resulted in respondent's injuries occurred when she had completed the act of placing the truck at the edge of the station platform and while she was walking back across the platform to the station, presumably for

her own convenience and while she was not performing any act of service; that this suit was brought under the act of Congress known as the Federal Employers' Liability Act, which provides that a common carrier by railroad, while engaged in commerce between the States, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce—

> "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, *or* by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Your petitioner further shows that it was neither alleged nor contended by respondent that her injury resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, but that, on the contrary, respondent sought to bring her case within the second clause of the statute just quoted and following the word "or"; that your petitioner contended before, and argued to, said Supreme Court of Missouri (1) that respondent's injury did not result from any defect or insufficiency due to petitioner's negligence in respect to any of the appliances or equipment mentioned in said statute; (2) that the only word in said statute which would cover a station platform, such as is involved in this case, was the word "works," and (3) that this particular station platform was not a part of the works of your petitioner.

Your petitioner further shows that said Supreme Court of Missouri held that this case was within the provisions of said clause of said act, and, in so holding, said Supreme Court of Missouri has decided a Federal question of substance not heretofore determined by this Court and has decided it in a way probably not in accord with applicable decisions of this Court.

Your petitioner further shows that the Supreme Court of Missouri in deciding this case held that respondent did not assume the risk of injury arising from the conditions which the testimony establishes existed at the time of her injury; that in so holding the Supreme Court of Missouri referred to, but failed and refused to apply and follow, the law as declared by this Court upon the question of assumed risk in cases brought under the Federal Employers' Liability Act; that, on the contrary, the Supreme Court of Missouri applied to the facts of this case the rule of assumed risk as announced by the Supreme Court of Missouri in cases not based upon the Federal Employers' Liability Act, and in so doing used the following language (Rec., p. 164):

> "The evidence tends to show that the defendant was negligent in the construction and maintenance of the platform, and that such negligence was the proximate cause of plaintiff's injuries. 'The rule is firmly established in this State that the servant never assumes the risk of injury created by the negligence of the master.'"

Your petitioner further shows that in so holding the Supreme Court of Missouri has decided a Federal question of substance in a way not in accord with the applicable decisions of this Court, and that the decision of said Supreme Court of Missouri fails to follow and is in conflict with the law as declared by the decisions of this Court in the following cases:

Seaboard Air Line Railway *v.* Horton, 233 U. S., 492.

Jacobs *v.* Southern Ry. Co., 241 U. S., 229.

Chesapeake, etc., Ry. Co. *v.* De Atley, 241 U. S., 310.

Chesapeake, etc., Ry. Co. *v.* Proffitt, 241 U. S., 462.

Erie Railroad Co. *v.* Purucker, 244 U. S., 320.

Boldt *v.* Pennsylvania R. R. Co., 245 U. S., 441.

Prior *v.* Williams, 254 U. S., 43.

Your petitioner further shows that the Supreme Court of Missouri failed, or refused, to hold that the injuries suffered by respondent were solely due to her own primary negligence with respect to the manner in which she walked across this platform and with respect to her failure to see and avoid slipping and falling upon the ice or upon the sides of the depression or ditch in which the ice was; that, on the contrary, said Supreme Court of Missouri decided that if respondent was guilty of any negligence, such negligence merely contributed to her injury and did, therefore, not bar her right to recover. Your petitioner shows that in so holding the Supreme Court of Missouri has decided a

Federal question of substance in a way not in accord with the applicable decisions of this Court, and that said decision of said Supreme Court of Missouri fails to follow and is in conflict with the law as declared by the decisions of this Court in the following cases:

Great Northern Ry. Co. *v.* Wiles, 240 U. S., 444.
Davis *v.* Kennedy, 266 U. S., 147.
Frese *v.* C., B. & Q. R. R. Co., 263 U. S., 1.

WHEREFORE, in view of the premises, your petitioner prays that this Honorable Court will grant its writ of certiorari, directed to the Supreme Court of Missouri, requiring that the complete record in said cause in said court and its judgment herein be certified to this Court, and that this Honorable Court will thereupon proceed to correct the errors complained of and to reverse the judgment of said Supreme Court of Missouri and to give to your petitioner such other and further relief as the nature of the *case* may require and to the Court may seem proper in the premises.

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,
By EDWARD J. WHITE,
JAMES F. GREEN,
MERRITT U. HAYDEN,
Its Attorneys.

STATE OF MISSOURI,
City of St. Louis, ss:

Merritt U. Hayden, being duly sworn, says that he is one of the attorneys for the above-named petitioner, Missouri Pacific Railroad Company, and that he has knowledge of the matters and things set forth in the above petition and of the conduct of proceedings had in the above-entitled case, and that he verily believes that the facts as stated in said petition are true.

MERRITT U. HAYDEN.

Subscribed and sworn to before me this 23d day of June, 1926. My commission expires the 28th day of June, 1929.

[SEAL.] GEO. W. COLLINS,
Notary Public.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No.

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,

vs.

MARY I. AEBY, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This Case is Not Within the Operation of the Act of Congress Known as the Federal Employers' Liability Act.

Whether the allegations of respondent's petition plead a case within the provisions of the Federal Employers' Liability Act may well be doubted, but we contend that the facts established by the uncontroverted evidence certainly fail to bring the case within the operation of that act.

In the second paragraph of respondent's amended petition (Rec., p. 6) there is an averment that at all the times mentioned in said petition defendant was engaged in commerce between different States of the United States, and that at all such times, as well as at the time of her alleged injury, respondent was employed by petitioner in interstate commerce, to wit, as a station agent at Magness, in the State of Arkansas.

This allegation was admitted by petitioner, as it correctly stated the facts. Petitioner was engaged in interstate commerce and the particular train involved in this suit was a train which was operated between the city of Newport, Ark., and the city of Joplin, Mo., and, so far as her general duties were concerned as station agent, we presume it will be held that respondent was employed in interstate commerce.

This petition further alleges (Rec., p. 7)—

> "That in the discharge of her duty to defendant she did go to said station and delivered to said train and received from said train express, mail, and messages, such as said train delivered and received at said station, and while returning from said train to said station she fell upon the platform," etc.

The duty mentioned in this allegation may have been true as a general proposition, but the testimony of respondent herself, to which we shall more particularly direct attention hereinafter, discloses that she did not deliver any express, mail, or messages to this train on the morning of the accident and was not

injured while returning to the station after having either delivered to, or received from, said train express, mail, and messages. It appears from the evidence (Rec., p. 47) that some mail or express was placed on this truck upon arrival of the train, but a companion of respondent's carried same into the station in her hands. The truck was not moved away from the edge of the platform. At the moment of her injury she was not engaged in the performance of any duty for petitioner, and we contend that the case is not brought within the provisions of the Federal Employers' Liability Act, either by the allegations in respondent's petition or by the facts proved.

In accordance with the practice obtaining in Missouri, petitioner filed a general demurrer to this amended petition, the sole ground of which was that said petition "did not state facts sufficient to constitute a cause of action against petitioner" (Rec., p. 9). Nowhere in this petition is there any averment that respondent's injury resulted by reason of any "defect or insufficiency" due to petitioner's negligence in its "cars * * * works * * * or other equipment." The petition merely avers negligence in reference to certain conditions of the station platform.

The act of Congress known as the Federal Employers' Liability Act creates two rights of action for damages for injuries suffered by employees of a carrier engaged in interstate commerce, depending upon the nature of the cause of the injuries, namely: First, if the injury results in whole or in part from the negli-

gence of any of the officers, agents, or employees of such carrier; or, second, by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

There is no contention in this case that respondent's injury was due to negligence of any of the officers or agents or employees of petitioner. If the facts in this case bring it within the operation of this act, it is because of the second right of action given to respondent. Under that clause of the act the injury must have resulted from some defect or insufficiency due to the carrier's negligence in the appliances mentioned in the statute. A station platform is not specifically mentioned therein, nor does any word appear there which covers a station platform, unless it be the word "works."

The act known as the First Employers' Liability Act, or that of June 11, 1906, which was declared unconstitutional by this Court, did not, as to the second right of action, contain the words "boats, wharves, or other equipment," but included after the word "roadbed" the words "ways or works." It will be observed, however, that the word "ways" does not appear in the act now in force. Of course, it could hardly be successfully argued that a station platform was not a "way" of ingress and egress to and from the station or to and from the trains, but if a station platform comes within the enumeration of the present act it is because of the use therein of the word "works," and it is our contention that that word as used in the

statute pertains to structures owned or operated by the carrier, similar to machine shops, round-houses, or others of like character, and was not meant to include a station platform.

In volume 10 of the Century Dictionary, at page 6976, the word "work," a noun, is defined to be—

> "An establishment for manufacturing or for performing industrial labor of any sort; generally in the plural, including all the buildings, machines, etc., used in the required operations; as iron works—hence the plural is used as a collective singular, taking then a singular article as, a large glass works in the town."

One of the obvious purposes of this act was to create a right of action for damages for injuries suffered by those employed in work for railroad companies, such as in the operation of trains, by reason of which such employees were subjected to the characteristic hazards incidental to the business of operating a railroad. In the respects by which this act changed the common law upon the same subject the legislation was, and is, somewhat drastic. It creates new causes of action and destroys certain common law defenses in bar of such rights of action, and we submit that, when the character and purpose of this act are considered, it was not the intention of Congress to provide either a new cause of action or abolish certain common law defenses in bar in favor of one who was injured by simply walking across a station platform, even though the owner of the station platform was an interstate carrier and

the person injured could be said to be generally employed by such carrier in interstate commerce.

We have been able to find only one case in which this question has been considered, and that is the case of

Elliott v. Payne, 293 Mo., 591,

decided by the Supreme Court of Missouri, wherein it was held that where a locomotive fireman was injured in alighting from his engine on a railroad-station platform, which was in a defective condition, the case did not come within the Federal Employers' Liability Act. In that case, as in this, the alleged defective condition of the platform permitted an accumulation of water, snow, and ice thereon. The deceased fireman, in attempting to alight from his engine, slipped and sustained fatal injuries. Suit was brought by the administrator of his estate under the Federal Employers' Liability Act.

In deciding the case, the Supreme Court of Missouri directed attention to the fact that the word "ways," which appeared in the first Federal Employers' Liability Act, was not used in the present act. The court there said:

> "Reverting to the petition it will be noted that the negligence charged is that of the 'defendant' and not as to defendant's officers, agents or employees. The action is under the latter clause of section 1 of the Federal Employers' Liability Act, which reads: 'Or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or

other equipment.' Query: Does a depot platform fall within this enumeration? The statutory negligence, or neglect of duty, is as to the things mentioned, and none other. If a platform falls within the things named, then neglect of duty as to the platform gives actionable negligence; if not, then there is no negligence in the case, and plaintiff must fail in her action under this statute. * * *

"However writers and courts may differ in their views as to just what is covered by this statute, and as to whether the particular negligence falls under the first or second class of negligent acts named in the statute, it must be clear that the statute undertakes to change and modify the common law. In a sense it creates liability where there was none at common law. It destroys defenses which were recognized at common law. It makes that negligence of the master which was not his negligence at the common law. These radical changes are by statute, and it is to the statute that we must go to determine the master's negligence in a case brought under the statute. Suppose the statute (in its second specification of negligence) had stopped with the words 'cars, engines, appliances, track, roadbed,' could it be said that a defective station platform would be an actionable negligent act of a defendant under the statute? We think not, because it would not fall within any of the terms thereof. If not, then there could be no action under the Act of 1908 and its subsequent amendment in 1910 for such neglect or negligence. Congress, as ruled by the courts, had the power to pass the law, and of course had the right to limit the things, defects in which

should constitute negligence. Congress could have limited the law to engines, cars, tracks and roadbed. If it had, defects in appliances other than those named would not be actionable under the statute. For action thereon the party would be relegated to his common-law rights. In other words, the right to sue under this act is limited to the things mentioned in the law, and if a depot platform, maintained chiefly for the general public, rather than the employees of the railroad, does not fall within the act, then there was no actionable negligence. We have indicated above that a depot platform would not fall under the terms, 'cars, engines, tracks, roadbed or appliances.' The ordinary meaning of these words is well understood. The remaining words used are 'machinery, works, boats, wharves or other equipments.' It is clear that a depot platform would not fall under the head of either 'machinery,' 'wharves,' or 'boats,' so that we have left the two words 'works' and 'other equipments.' * * *

"If a depot platform falls within the terms of the Federal act at all, it must be that the word 'works' as used therein includes it. If not, it is beyond the purview of the statute."

The court then directs attention to several cases in which the word "works" has been construed, reaching the conclusion that the word clearly has reference to working places other than the tracks, roadbed, and their incidents, such as repair shops, engine-houses, railway yards, and switch-yards.

The court also discussed the meaning of the word

"ways," which appeared in the first act, but was "significantly" dropped from the second act, saying:

> "A depot platform, so far as its general use by the public is concerned, is largely a passage way from the outside world to the trains of the company, and from those trains to places outside of railroad property. In a very limited sense it may be a working place for certain classes of employees. Those employees whose duties require them to unload passengers, baggage or freight might say that it was a working place, but to other employees it would be a mere way of ingress and egress."

The facts are uncontroverted as to what occurred immediately preceding respondent's injury. Respondent had spent the night preceding her injury in this station. On the morning of the accident she came out of the station for the purpose of moving a truck, which was at the west end of the station (Rec., p. 22). She stepped off the steps leading from the station and went over to the truck, which was about ten feet away. She then moved the truck out to the edge of the platform nearest the railroad track (Rec., p. 23). After having thus placed the truck, which completed her duties so far as the handling of the truck was concerned until the arrival of the train, she proceeded to walk back across the platform for the purpose of entering the station (Rec., p. 47). If the word "ways" appeared in the present statute, this platform might be said to be embraced within its terms, and there would probably be no difficulty in reaching the conclusion that while

returning across the platform to the station, as respondent was doing immediately preceding her injury, she would be within the provisions of this act, if injured because of any defect or insufficiency in the platform due to petitioner's negligence; but we submit that this platform was not a part of the "works" of petitioner, and if it was not, then petitioner is not responsible under this act for any defect or insufficiency in the platform, and the rights of the parties are to be determined by the common law of the place where the accident occurred, and not by the provisions of the Federal act.

Respondent Assumed the Risk.

If the facts in this case bring it within the provisions of the Federal Employers' Liability Act, then certain principles well settled by the decisions of this Court are applicable, namely: (1) The provisions of that act, in so far as they may be held applicable to the facts in this case, supersede the State laws, which might otherwise determine the rights of the parties to this suit; (2) the common law, by which the question whether or not respondent assumed the risk is to be determined, is the common law declared and enforced by this Court, and not that declared and enforced by the State courts, and (3), under these decisions of this Court, respondent assumed the risk, not only of those injuries ordinarily incidental to her occupation, but also of those injuries which were likely to result from conditions arising from petitioner's negligence, which respondent

knew and appreciated, or which were so obvious that, as a reasonably prudent person, she would have known and appreciated.

This act was considered by this Court with respect to the question of assumption of risk in the case of

Seaboard Air Line Ry. Co. v. Horton, 233 U. S., 492; l. c., 503-4,

It was there held that section 4 of said act, in eliminating the defense of assumption of risk in the cases indicated, "quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action."

The court in that case called attention to the distinction between the defenses of contributory negligence and assumption of risk, and then said:

> "Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under

the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court." (Cases cited.)

As was said by this Court in the later case of

Boldt, Adm., *v.* Pennsylvania R. R. Co., 245 U. S., 441; l. c., 446:

> "The risk held to have been assumed in the Horton case certainly arose from negligence of some officer, agent or employee; and if the negligence of all these should be excluded in actions under the Employers' Liability Act, it is difficult to see what practical application could ever be given in them to the established doctrine concerning assumption of risk."

In the Horton case it was further said:

> "But by the common law, with respect to the assumption by the employee of the risk of injuries attributable to defects due to the employer's negligence, when known and appreciated by the employee and not made the subject of objection or complaint by him, it is quite immaterial whether the defect existed when the appliance was first placed in his charge, or subsequently arose."

This same rule has been many times announced in this Court since the Horton case was decided in opinions written by various members of the Court. Among

the cases in which the rule has been declared are those of:

Jacobs *v.* Southern Railway Co., 241 U. S., 229.
Chesapeake & Ohio Ry. Co. *v.* De Atley, 241 U. S., 310.
Chesapeake & Ohio Ry. Co. *v.* Proffitt, 241 U. S., 462.
Erie R. R. Co. *v.* Purucker, 244 U. S., 320.
Boldt *v.* Pennsylvania R. R. Co., 245 U. S., 441.
Pryor *v.* Williams, 254 U. S., 43.

In the Jacobs case (241 U. S., 229) the plaintiff was engaged with a crew in shifting cars in the company's yard. He descended from the engine to get drinking water for himself and the engineer. He returned with a can of water, to mount the engine and tripped on a pile of cinders and fell under the engine. He had often attempted to board engines while they were moving. The cinder pile was about 18 or 24 inches deep. The cinders were right up against the rail and sloped from the rail up. He testified that he knew that the cinders were there, but did not know that it was dangerous, and that at the moment of his injury he had forgotten that they were there. In holding that plaintiff was not entitled to recover, this Court said:

> "He admitted a knowledge of the 'material conditions' and it would be going very far to say that a fireman of an engine who knew of the custom of depositing cinders between the tracks, knew of their existence, and who at-

> tempted to mount an engine with a vessel of water in his hands holding 'not over a gallon' could be considered as not having appreciated the danger and assumed the risk of the situation because he had forgotten their existence at the time and did not notice them."

In the case of

Pryor *v.* Williams, 254 U. S., 43,

the plaintiff was injured while using a defective claw bar. To discover the defect required an examination of the under side of the tool. Plaintiff testified that in obeying the order of the foreman he did not pause to make such inspection, but used the tool without any but a casual inspection of its top surface, which did not reveal the defect. The case arose in Missouri. In the trial court plaintiff recovered a judgment, from which an appeal was taken to the Kansas City Court of Appeals, where the judgment was reversed, but on a certificate of one of the judges of that court the case found its way to the Supreme Court of Missouri. The latter court held in that case, as it held in this, that the failure to furnish a reasonably safe claw bar was negligence on the part of the employer, and that under the rule obtaining in Missouri the use by plaintiff of the claw bar in its defective condition was one of contributory negligence, which was not a bar under the Federal statute, and the defense of assumption of risk was not available in bar of plaintiff's right to recover.

Upon the case reaching this Court the judgment of the Supreme Court of Missouri was reversed. This Court held, in effect, that the case was to be determined by the rule upon the question of assumption of risk as declared by this and other Federal courts, and not by the rule obtaining in the State courts.

In view of the law as declared in these decisions and assuming, for the purpose of this discussion, that the case comes within the provisions of the Federal Employers' Liability Act, we submit that respondent assumed the risk of injury due to the condition of the station platform complained of, even though, as the testimony may be said to have tended to establish, such condition existed as the result of petitioner's negligence.

In this proceeding petitioner relies upon and will refer only to the testimony given by respondent herself. As we have stated in the application, respondent was about 34 years of age at the time of her injury. She entered the employ of petitioner at this station on July 2, 1920, and remained continuously in its employ at that station until the 13th of January, 1921, at which time she was injured. During all of that time, whenever rain fell, there was a depression or drain in front of the steps (Rec., p. 22). In response to the question, asked her by her own counsel, as to the cause of this depression or drain, she answered: "By the passage of people passing in and out, and also by the water running in front of the door" (Rec., p. 19). Respondent further testified on her direct examination that she had observed rains before the day of the accident on the plat-

form; that she had observed that water would run before the door; that the water stuck into the platform, and that the platform absorbed the water (Rec., p. 22).

On cross-examination she testified that from July, 1920, until January, 1921, rain had fallen on several occasions in that vicinity; that she had observed that when it fell the rain fell from the roof and made this ditch or drain in front of the station; that when the rain would first fall the water would accumulate in front of the station, and then later the ditch would absorb it or it would run away; that she had often noticed this condition whenever it rained (Rec., p. 35).

Again, she testified that the depression or ditch was before the door when she went to work at this station; that it remained there all that time, and that the station platform in other respects, except as to the snow and ice, was in the same condition at the time of her injury as it was when she went to work there in July, 1920 (Rec., p. 55).

On recross-examination, respondent testified that this depression got wider and deeper from July, 1920, until January, 1921; that it wore out the last month; that the more rain fell the deeper it would wear (Rec., p. 68); that the rain had washed it out some the night before she was hurt; that the rain washed it deeper that night (Rec., p. 69). And again, on recross-examination, she testified that every morning when she was on duty she moved the truck out to the north edge of the platform next to the tracks to meet the morning train (Rec., p. 69); that she would move the truck out and then go back to the station and wait for the train;

that every morning, when she would go back from the truck to the station, she had to step over this ditch or drain; that she saw water in the drain, and that on occasions, when there was water in the drain, she stepped across it onto the steps (Rec., p. 70). She further testified that the same conditions with reference to light around the station had existed there during all the time that she worked there as existed on the morning of her injury; that there never were any other lights there than what she had that morning (Rec., p. 70).

On the night before her injury, respondent testified she met the evening train, received the mail from it, took the mail to the post office, and returned to the station, where she spent the night; that this occurred about 9 o'clock; that thereafter she was not out of the station again that night; that when she entered the station, after returning from the post office, there was no rain or snow or sleet anywhere around there; that about 10 o'clock it began to rain. She knew it was raining. That she arose about 6 o'clock on the morning of the 13th and went out of the station (Rec., p. 38); that she then noticed there were about two or three inches of snow on the steps and as far as you could see from the depot; that the snow was all over town; that the two steps leading from the station were covered with snow; that, as she stepped off the steps to walk to the truck, she walked in the snow (Rec., p. 39); that, arriving at the truck, she discovered that there was snow and sleet on the truck; she saw where it had rained and frozen on the truck before it snowed; she and her companion moved the truck to the edge of

the platform nearest the tracks (Rec., p. 40); that when she came out of the station that morning she knew it was cold and was snowing; that she found out that it had frozen. She first noticed that it had frozen on the truck before she was injured (Rec., p. 52).

With respect to her knowledge of the conditions immediately before the accident, she testified that she did not know the ice was before the door, but that she did know it had sleeted and snowed (Rec., p. 54). She knew the ice had formed on the truck; that it had been cold enough to freeze, and she knew if she stepped on any ice she was likely to slip (Rec., p. 54). Whatever ice was there formed during the night preceding the injury (Rec., p. 54). Respondent was injured while walking from where she had placed the truck to the entrance to the station (Rec., p. 52).

From the testimony of respondent the following facts bearing upon the defense of assumption of risk are deducible:

First. That the depression had existed during all of the period of her employment at this station.

Second. That she was thoroughly familiar with the fact that, when it rained, water would accumulate in this depression.

Third. That she knew it had rained shortly before her injury.

Fourth. That she knew, before she fell, that the weather was cold enough for ice to form on this platform or on objects, such as the truck, placed on the platform.

Fifth. That she knew it had snowed and was snowing.

Sixth. That the size of the depression was such that the ice therein was, according to her estimate, two or three feet square.

Upon these facts, we submit that she could easily have discovered and avoided stepping upon this ice.

The theory of respondent in this case, and the theory upon which the Supreme Court of Missouri held petitioner negligent, was not with respect to the accumulation of ice in this depression, but only with respect to the original construction of the platform and station, which permitted the temporary accumulation of water therein, which cast upon the petitioner the duty of anticipating that, in freezing weather, ice might be formed.

Instead of deciding whether, by applying the rule of assumption of risk as declared by this Court, respondent should be held to have assumed the risk, the Supreme Court of Missouri declared and applied the rule obtaining in that State in actions brought under State law and held that, because it found that petitioner was negligent with respect to the construction of the platform and station, the defense of assumed risk was thereby removed from the case.

At page 164 of the record, the Supreme Court of Missouri said:

> "The rule is uniformly established in this State that the servant never assumes a risk of injury created by the negligence of the master."

while at page 165 of the record the court quoted from its opinion in the prior case of

McIntyre v. Railway Co., 286 Mo., 234; 227 S. W., 234,

in which the same court there said:

> "The Federal courts, in cases arising under the Federal Employers' Liability Act, hold that an employee in entering upon a contract of employment assumes all the risks and dangers ordinarily incident to his employment and risks caused by the employer's negligence, which are obvious and fully known to the employee and appreciated by him, or so plainly observable that he must be presumed to know them."

That court then held that respondent did not know or apprehend that there was ice in the depression under the snow, and that she did not appreciate the danger of stepping thereon nor assume the risk of so doing (Rec., p. 164).

If, as this Court has said, and if the rule is as the Supreme Court of Missouri held it to be in the McIntyre case, the servant assumes the risk caused by the employer's negligence, which are so plainly observable that he must be presumed to know them even though he may not actually know them, then we submit that respondent in this case should have been held to have assumed the risk of injuries arising from the conditions existing at the time and place of her injury. We repeat that she knew that the depression was right where it was, namely, in front of the steps; that it had rained during the night; that, whenever it rained, water accu-

mulated in the depression in front of the steps leading to the station. She knew that it had frozen and that ice had formed elsewhere on the platform. She knew that there was snow on the platform, and we submit that she could easily have ascertained, by the exercise of ordinary care, that this particular depression contained ice, especially if that ice was two or three feet square. It is, perhaps, true that she did not observe the condition of this depression before she fell, but she observed it afterwards and then found that there was snow and ice in it and that it was rough and uneven (Rec., p. 24). And so we submit that respondent should not be permitted to escape the consequences of the application of the rule of assumed risk, as declared by this Court, to the facts established by her testimony, and that, in holding that she did not assume the risk, the Supreme Court of Missouri fell into the same error, which resulted in the issuance by this Court of its writ of certiorari in the case of Pryor *v.* Williams, *supra*, and in the reversal by this Court of the judgment of the Supreme Court of Missouri in that case.

Respondent's Injury was Solely Due to Her Own Negligence, Which was Primary and Not Contributory.

We have already called attention to the testimony given by respondent herself with respect to her actions immediately prior to her injury. She knew of the existence of the depression, and that when it rained water would form therein. She knew that it had rained during the night preceding the injury and she knew as soon as she stepped out of the station in the morn-

ing that it had frozen. She was 34 years of age, and certainly should be held to know that ice was likely to have formed in this depression. She also knew that the ground was covered with snow, and she further knew that whenever there was water in the depression, as she says there always was following a rain, she had to, and did, step over it in order to get into the station. On this occasion, instead of stepping over it, she stepped, or slipped, into it, notwithstanding her estimate that this depression was "something like four or five feet square and twelve inches deep" (Rec., p. 20).

We submit that, to hold that her negligence is not a bar to her right to recover, simply because the suit was attempted to be brought within the provisions of the Federal Employers' Liability Act, as this Court held in the cases of

Great Northern Ry. Co. v. Wiles, 240 U. S., 444;
Davis v. Kennedy, 266 U. S., 147;
Freese v. C., B. & Q. R. R., 263 U. S., 1,

would be a perversion of the statute.

For all of these reasons we submit that the Supreme Court of Missouri erred in its decision in this case and that the writ of certiorari should issue.

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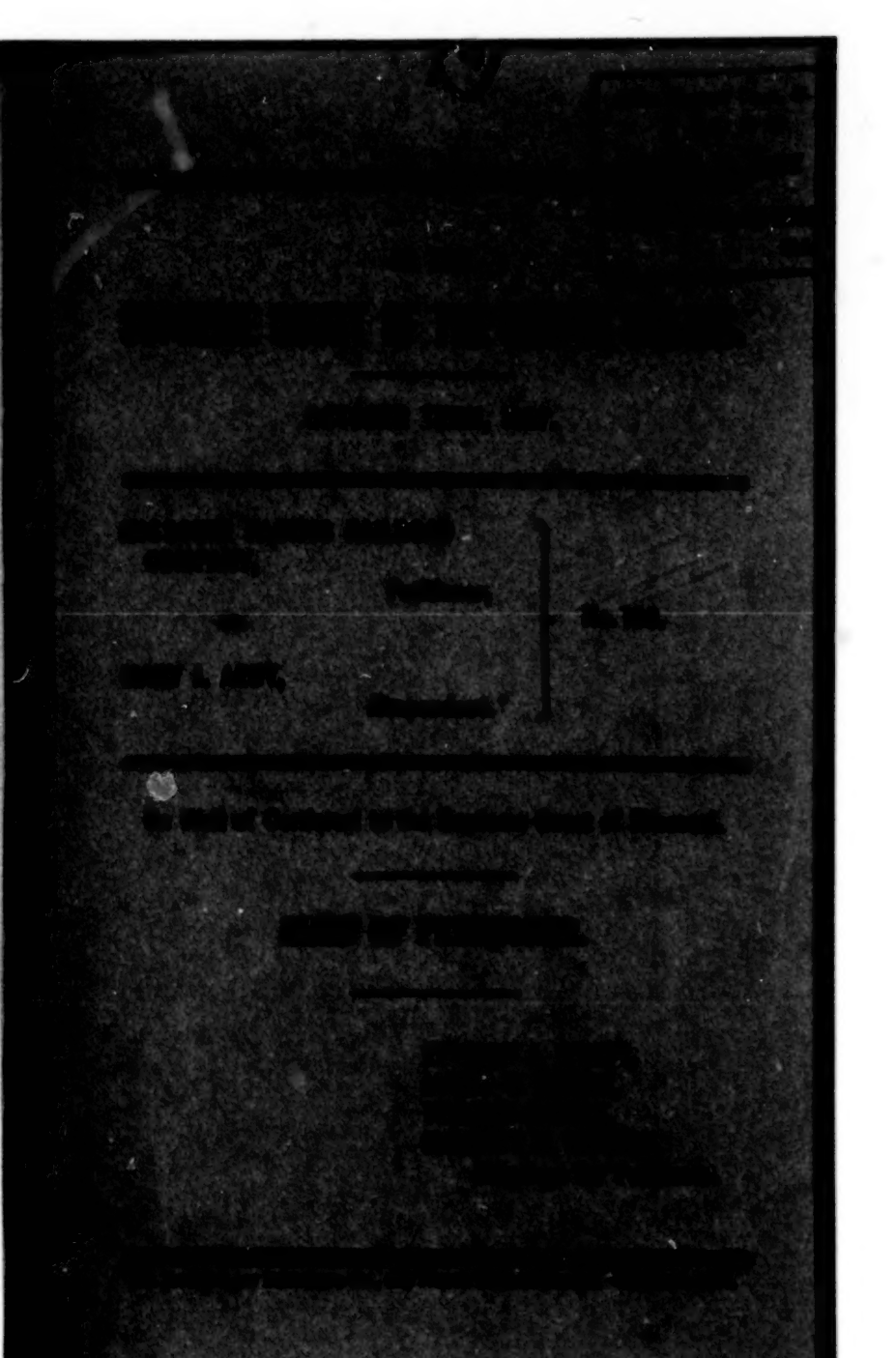

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,
vs.
MARY I. AEBY,
Respondent.
No. 100.

On Writ of Certiorari to the Supreme Court of Missouri.

BRIEF OF PETITIONER.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED.

This case is in this court on writ of certiorari, granted on October 25, 1926, to review the judgment of the Supreme Court of the State of Missouri, affirming a judgment of the Circuit Court, City of St. Louis, Missouri, in favor of respondent and against petitioner, in the sum of

fifteen thousand dollars ($15,000.00) for damages for personal injuries alleged to have been sustained by respondent while in the employ of petitioner (R. 9), the case involving the construction and application of the Act of Congress, known as the Federal Employers Liability Act.

REFERENCE TO REPORT OF OPINION OF COURT BELOW.

The opinion of the Supreme Court of Missouri will be found in Volume 313, Missouri Supreme Court Reports, at page 492, and also in 285 Southwestern Reporter, at page 965.

DATE OF JUDGMENT TO BE REVIEWED.

The judgment of the Supreme Court of Missouri was rendered on April 5, 1926 (R. 118).

The opinion of that Court will be found in the record beginning at page 118 and ending at page 132.

A motion for rehearing was duly filed in said Supreme Court of Missouri (R. 132), which motion was overruled on May 28, 1926 (R. 132).

The judgment having been rendered by one of the two divisions of said court, motion was duly filed, praying for an order transferring said cause to said Supreme Court of Missouri en banc, for further consideration (R. 133), which motion was overruled on May 28, 1926 (R. 134).

THE JUDGMENT, SOUGHT TO BE REVIEWED, IS A FINAL JUDGMENT.

The Supreme Court of the State of Missouri is the court of final appellate jurisdiction in all cases brought for the recovery of damages for personal injuries wherein the amount of the judgment appealed from is in excess of the sum of seven thousand five hundred dollars ($7,500.00). The amount of the judgment, in this case, is in excess of that sum, to wit, the sum of fifteen thousand dollars ($15,000.00) (R. 1).

The decision of the Supreme Court of Missouri was one affirming the judgment (R. 188). If that affirmance is upheld by this Court the litigation is ended and nothing remains to be done by petitioner but to satisfy the judgment by the payment of the amount thereof with interest and costs.

The decision in this case was rendered by Division No. 2 of the Supreme Court of Missouri (R. 118).

The opinion was written by one of the Commissioners of that division and was unanimously adopted and concurred in by the Judges thereof (R. 132).

Petitioner filed a motion for rehearing which was overruled (R. 133). Thereupon, by way of exhausting all possible remedies, petitioner filed its motion to transfer the case to the court en banc in an effort to have the case decided by the entire membership of the court. This motion was overruled (R. 133).

CLAIMS ADVANCED AND RULINGS MADE IN THE LOWER COURT.

As stated in the opinion of the Supreme Court of Missouri, "respondent sued petitioner under the Federal Employers' Liability Act for damages for personal injuries sustained by her while employed by petitioner as a station agent" at Magness, a small village of about 400 inhabitants, on one of the lines of petitioner's railroad in the State of Arkansas. The jury returned a very substantial verdict for respondent, for a portion of which judgment was rendered, which judgment the Supreme Court of Missouri affirmed.

Early in the morning of the day on which she was injured, respondent had pulled a baggage or express truck across the station platform to the edge of the platform adjacent to the track and had there left it in position to receive baggage or express from a train due to presently arrive at that station.

Having thus [illegible]ed the truck, respondent proceeded to walk back across the station platform to the station. When she had about reached the station building, she slipped on some snow or ice which had fallen and formed there during the night and fell, sustaining injuries.

By way of attempting to base her right to recover, if any, upon an alleged violation of the act of Congress, known as the Federal Employers' Liability Act, respond-

ent alleged in her petition (R. 3) that, at the time in question, defendant (petitioner)

> "was engaged in commerce between different states of the United States, to wit, between the State of Arkansas and the State of Missouri,"

and that at the time of her injury plaintiff (respondent)

> "was employed by defendant in interstate commerce, to wit, as a station agent," etc.

She further alleged that in the performance of her duties she was required to pass over the platform extending from the station to the tracks and that while so doing she fell upon the platform and was injured (R. 3).

Certain specific acts of negligence were then alleged with respect to the construction of the roof of the station and of the platform, permitting rain and snow to accumulate and ice to form thereon, and insufficient lighting of the platform, which allegations were put in issue by petitioner's answer (R. 5 and 6) after it had unsuccessfully interposed a demurrer to the petition upon the ground that same did not state any cause of action (R. 5).

In its submission of this case to the Supreme Court of Missouri, upon the issues raised and upon the entire record of the case, petitioner contended:

First. That neither the pleadings nor the evidence disclosed a state of facts to which the Federal Employers'

Liability Act was applicable or upon proof of which that act authorized a recovery. More particularly this contention was that a station platform was not among the things enumerated in the act for "any defect or insufficiency" in which a railroad company might be held negligent; that the only word in the act which did not definitely exclude a station platform was the word "works," and that when the well-understood meaning and definition of the word "works" was considered it did not include a station platform.

The Supreme Court of Missouri rules against petitioner upon this point, saying:

> "While the station platform may not be embraced within the other words of the act, it would seem that the general term 'works' is sufficiently comprehensive" (R. 124).

Second. That, if the act be held to apply, then there was a failure of proof of actionable negligence on the part of petitioner causing respondent's injuries.

(This station platform was made of chat or gravel. The evidence of respondent herself established that when it rained, the rain falling from the roof of the station would wear a depression, or shallow trench in the chat; that when the rain stopped, the chat would absorb the water; that the rain, which formed the ice, and snow on which she slipped fell during the preceding night, thereby creating a condition which had existed for only a few

hours, during the night. There was no showing that petitioner either knew, or by the exercise of ordinary care could have known, of such condition in time to have, by the exercise of ordinary care, prevented the injury, even if it were its duty to do so.)

The Supreme Court of Missouri decided this point against the contention of petitioner (R. 120 to 123).

Third. That if the facts of this case bring it within said act, then, under the uncontradicted evidence of respondent herself, establishing that she was thoroughly familiar with the existence of all of the conditions which, she claims, caused her injury and that she fully appreciated such risks of danger, if any, as arose by the reason of the existence of those conditions, she assumed those risks and is not, for that reason, entitled to recover.

The Supreme Court of Missouri decided this point against petitioner by applying the rule, relating to assumption of risk, as announced by that Court, and by other courts of the state, rather than the rule announced by this Court, saying:

> "The rule is firmly established in this state that the servant **never** assumes a risk of injury created by the negligence of the master" (R. 125).

In so holding, the decision of said Court is in direct conflict with, and opposition to, many decisions of this Court hereinafter cited, among which is Pryor v. Williams, 254 U. S. 43.

Fourth. That respondent's injuries were solely caused by her own carelessness.

The Supreme Court of Missouri decided this point against petitioner (R. 130 and 131), and, in this respect, the decision is in conflict with the decisions of this Court in the following cases involving this same act:

Great Northern Railway Co. v. Wiles, 240 U. S. 444;
Freese v. Chicago, Burlington & Quincy Railroad Co., 263 U. S. 1;
Davis v. Kennedy, 266 U. S. 147.

ACT OF CONGRESS RELIED UPON TO INVOKE JURISDICTION OF THIS COURT.

The particular statutory provisions under which the jurisdiction of this Court is invoked are Sections 1 and 4 of the Act of Congress known as the Federal Employers' Liability Act (35 Stat. at L. 65, Chap. 149, U. S. Comp. Stat. Supp. 1909, p. 1171). This act is set out in full in the appendix, infra. (The amendment to the Act of April 5th, 1910, is not involved.)

The material portions of the act particularly involved in this case are as follows:

Section 1 (in part):

> "That every common carrier by railroad while engaging in commerce between any of the states or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death

resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, **or** by reason of any defects or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, **works**, boats, wharves, or other equipment."

Section 4:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of any of, its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."

For purposes of comparison, the first section of the act, known as the "First Federal Employers' Liability Act," is also printed in the appendix.

CASES DECIDED BY THIS COURT, RELIED UPON TO SUSTAIN JURISDICTION OF THIS COURT OVER THIS CASE.

The cases upon which petitioner relies to sustain the jurisdiction of this Court of this case are those in which this Court has decided that, in a case in which a recovery for damages is sought because of alleged violations of provisions of the Federal Employers' Liability Act, questions with respect to (a) the negligence of the carrier; (b) the

negligence of the injured; (c) assumption of risk of employment by the injured, and (d) the right of recovery, are to be determined by the rules of common law, as announced by this Court, rather than by those rules as declared by the courts of the various states.

Among such cases, which were called to the attention of the Supreme Court of Missouri in the submission of this case, are the following:

Seaboard Air Line Railway Co. v. Horton, 233 U. S. 492;

Jacobs v. Southern Railway Co., 241 U. S. 229;

Pryor v. Williams, 254 U. S. 43;

Patton v. Railway Co., 179 U. S. 658;

Looney v. Metropolitan Railroad Company, 200 U. S. 480;

Boldt v. Pennsylvania Railroad Co., 245 U. S. 441, 62 L. Ed. 385;

Southern Railway Co. v. Crockett, 234 U. S. 725, 58 L. Ed. 1564;

Great Northern Railway Co. v. Wiles, 240 U. S. 444;

Frese v. C. B. & Q. R. R. Co., 263 U. S. 1;

Davis v. Kennedy, 266 U. S. 147.

Other cases announcing the same principle, not called to the attention of the lower court, are the following:

Chesapeake & Ohio Railway Co. v. De Atley, 241 U. S. 310;

Chesapeake & Ohio Railway Co. v. Proffitt, 241 U. S. 462;

Erie Railroad Co. v. Purucker, 244 U. S. 320;

Chesapeake & Ohio Railway Co. v. Nixon, 271 U. S. 218.

STATEMENT OF THE CASE.

The jurisdiction of this Court is invoked in this case upon the ground that the judgment of the Supreme Court of Missouri, which is final, erroneously interpreted the Act of Congress known as the Federal Employers' Liability Act, and erroneously applied the law interpreting said act, in holding, first, that said act applied to the situation involved in this case; secondly, even if said act may be relied upon for a recovery herein, (a) that the negligence alleged was established by the proof; (b) that respondent did not assume the risk of injury arising from the conditions which existed at the time and place of the accident, and (c) that the sole cause of respondent's injuries was not her own negligence.

The jurisdiction is also invoked upon the further ground that the judgment of the Supreme Court of Missouri, which is final, is in conflict with, and fails to follow, decisions of this Court construing and applying the provisions of said act to facts similar to those established by the proof in this case.

A consideration of the material allegations of respondent's petition and of petitioner's answer may be of assistance in the consideration of the case and we, therefore, here summarize same.

Summary of Respondent's Petition.

The petition first alleged that, at all times mentioned therein, petitioner was engaged in commerce between different states of the United States, to wit, between the State of Arkansas and the State of Missouri, and that, at the time of her injury, respondent was employed by petitioner in interstate commerce; that she was employed as station agent; that it was her duty to go from the station to the trains for the purpose of carrying on the business of petitioner, and that in so doing she was required to pass over a platform extending from the station building to the tracks; that, on the day of the accident (January 13, 1921), in the early morning, before it was fully light, she delivered to a certain train, and received from said train, express, mail and messages, and while returning from said train to the station she fell upon the platform (R. 3).

It was further alleged in said petition that your petitioner was guilty of negligence in that:

(1) Said station platform was not lighted (R. 4).

(2) Said platform was covered with snow, sleet and ice, and one was liable to slip thereon (R. 4).

(3) That the surface of said platform was composed of chat and fine gravel, so loosely put together that depressions, holes and drains would form in it, leaving the surface uneven, slanting, and with ridges and irregular places appearing on its surface (R. 4).

(4) That petitioner did not put or maintain troughs or gutters on its depot building, but allowed the water falling on the roof of said depot to fall on the chat or gravel platform in front of the door and caused said chat and gravel to become loose, so that a depression like a gully or trough formed in front of the depot door. And that the chat or gravel was carried away from in front of the door by persons passing in and out of said depot and the water falling on said depot and said platform flowed toward the depression in front of said door and cut a depression or ditch in front of said door and around the corner of said depot, which ditch or depression had sharp, slanting sides, and also slanted downward toward the end of the depot, and that in cold weather, when rain, snow and sleet fell, ice formed in the bottom and on the sides of said ditch or depression and formed a slick, ice-covered and irregular surface, rendering it dangerous for a person to step into or upon said ditch or its sides (R. 4).

It was further averred in said petition that at the time of her injury the depot platform was dark and unlighted, and that respondent had no knowledge that said depot platform was in the unsafe and dangerous condition aforesaid, nor could she have knowledge of such fact by the exercise of ordinary care, and that, in passing over said platform on said date, she stepped upon and into said ditch or depression and upon the irregular surface of same, which was then covered by a coating of ice, snow

and sleet, and fell violently to the platform, resulting in the injuries complained of (R. 4).

Summary of Answer of Petitioner.

In its answer petitioner admitted that at all the times mentioned in respondent's petition defendant (petitioner) "was engaged in commerce between different states of the United States, to wit, between the State of Arkansas and the State of Missouri, and at all such times the plaintiff was employed by defendant in interstate commerce, to wit, as a station agent at Magness" (R. 5 and 6).

It was further admitted that the train mentioned in the petition to which she was required to deliver, and from which she was required to receive, express and mail was a train which was operated and carried passengers between the City of Newport, Arkansas, and the City of Joplin, Missouri (R. 5 and 6).

These admissions were then followed by a general denial of each and every other allegation in said petition, and, in accordance with the Missouri practice, by affirmative pleas of contributory negligence and assumption of risk (R. 6 and 7).

The Facts.

The facts upon which reliance is based for a reversal of the judgment of the court below are all established by the uncontroverted testimony of respondent herself,

some of them being stated in the opinion of the Supreme Court of Missouri, although there are several facts of material importance to which no reference is made in said opinion. Briefly, they are as follows:

At the time of her injuries respondent was about 34 years of age. Her manner of testifying, as disclosed by many of her answers to questions propounded to her, shows that she was a woman of much more than average intelligence. She had lived, during most of her life, within twenty miles of the station, on petitioner's line of railroad, known as Magness, Arkansas. She first entered the employ of petitioner as ticket agent, at a station called Morefield, about five or six miles from Magness, on March 20th, 1919, where she worked until July 2nd, 1920, when she was transferred to, and began work at, the station at Magness, a small town of about 400 people, her employment there being in the capacity of station agent (R. 11).

Her duties as such station agent were to do the book work, sell tickets and handle the express and freight work (R. 11). At the time of her injury there were four trains which passed that station. One passenger train passed there, northbound, at 6:18 in the morning and one passenger train, southbound, at 6:41 in the evening; then at 8:50 in the morning and at 12:38 in the afternoon two local, or mixed, trains passed through (R. 12).

The station was a small wooden building. At either end of the building and extending out to the track there

was a station platform composed of chat or small gravel. The uncontradicted evidence tended to establish that, when it rained, the rain, falling upon the roof of the station, and "the passage of people in and out of the station" would cause a depression, or small ditch or drain, to wear in the chat (R. 13). This ditch or depression extended across that part of the platform in front of the door leading into the station (R. 13). This condition arose and existed whenever it rained, during the entire time of respondent's employment at this station (R. 28). During all of that time respondent was "practically" in sole charge at this station (R. 26).

Respondent's testimony discloses in considerable detail that she was thoroughly familiar with all of these conditions while she worked at this station. She further paid very close attention to weather conditions in that vicinity, keeping a book in which she made daily entries of those conditions (R. 29).

On the night preceding her injury respondent met the train southbound, due at Magness at 6:41. She received the mail from that train and took it to the village post office. Thereafter, she returned to the station, where she remained all night (R. 30). When she returned to the station the weather was clear; the platform was perfectly dry and there was no accumulation of either water, snow, ice or sleet thereon (R. 30). Some time during the night, however, it first rained, then sleeted, and then snowed (R. 30). Respondent heard the rain and sleet and knew

that during the night those conditions prevailed. She arose the next morning—the morning on which she was injured—and stepped out of the station, walking to one end of it, where she proceeded to get the truck which was kept there for use in handling baggage and express. With the assistance of a companion she pulled it out to the edge of the platform alongside the railroad track, preparatory to meeting the train due there at 6:18 a. m. (R. 30 and 31). As stated, respondent knew that it had sleeted during the night, and that there was snow all over the platform and all over the village, as far as could be seen from the station, as soon as she stepped out of the station and before she was injured (R. 31). When she attempted to move the truck she discovered that it was covered with snow and sleet and she could see that it had rained and frozen on the truck before it snowed (R. 32). She pulled the truck out to the edge of the platform and placed it in its proper position, without any mishap and without the occurrence of anything unusual. Leaving the truck in the position just mentioned, respondent proceeded to walk across the platform towards the station. When she reached the point near the steps leading to the station she slipped on the side of a depression which contained snow or ice, or both, which had accumulated during the night, and fell, sustaining the injuries for which she sued (R. 58).

The evidence is uncontradicted that from the moment

at which respondent stepped from the station to the moment of her fall, she possessed full knowledge of the condition existing on this platform and full appreciation of the risks, if any, incidental to walking across it.

In view of the evidence, it was and is petitioner's contention that for the reasons heretofore outlined, which we shall now discuss a little more fully, respondent is not entitled to recover, and that if the Supreme Court of Missouri had applied the law as declared by this Court to the facts herein disclosed it would have reversed the judgment of the lower court.

ASSIGNMENT OF ERRORS.

I.

The Supreme Court of Missouri erred in holding that the act of Congress known as the Federal Employers' Liability Act applied to the facts in this case, and that respondent could maintain this action under said act, and that a station platform such as is described in the evidence in this case is among the things for "any defect or insufficiency" in which, due to its negligence, petitioner is liable.

II.

The Supreme Court further erred in holding that the evidence adduced by respondent established the negligence charged against petitioner.

III.

Said Supreme Court further erred in holding that, inasmuch as the evidence tended to establish that petitioner was negligent, as charged, respondent did not assume the risk of injury arising from such negligence, and in further holding and applying the rule upon the subject of assumption of risk, as announced by the Supreme Court of Missouri, instead of applying the rule upon that subject as declared by this Court. In this respect the de-

cision of the Supreme Court of Missouri is in conflict with decisions of this Court as announced in the following cases:

Seaboard Air Line Railway Co. v. Horton, 233 U. S. 492;
Jacobs v. Southern Railway Co., 241 U. S. 221;
Pryor v. Williams, 254 U. S. 43;
Boldt v. Pennsylvania Railroad Co., 245 U. S. 441;
Looney v. Metropolitan Railroad Co., 200 U. S. 480;
Chesapeake & Ohio Railway Co. v. Nixon, 271 U. S. 218.

IV.

Said Supreme Court further erred in not holding that respondent was not entitled to recover upon the ground that her injury was solely due to her own negligence, and in this respect the decision of said Supreme Court is in conflict with the decisions of this Court as announced in the following cases:

Great Northern Railway Co. v. Wiles, 240 U. S. 444;
Frese v. C. B. & Q. R. R. Co., 263 U. S. 1;
Davis v. Kennedy, 266 U. S. 147.

SUMMARY OF ARGUMENT AND BRIEF WITH POINTS, AUTHORITIES AND STATUTES RELIED UPON.

I.

The Evidence, in This Case, Fails to Establish Facts to Which the Federal Employers' Liability Act Is Applicable.

It may well be doubted that respondent's petition contained allegations sufficient to bring this case within the provisions of the Federal Employers' Liability Act. Petitioner filed a general demurrer to said petition (R. 5), the ground of which was that same did "not state facts sufficient to constitute a cause of action." This demurrer was overruled (R. 5) whereupon petitioner filed its answer. It was alleged, in respondent's petition, that petitioner was engaged in commerce between states and that she was employed by it in such commerce (R. 3).

These allegations were admitted by petitioner, as they correctly stated the facts. Petitioner was engaged in interstate commerce and the particular train involved in this suit was a train which was operated between the City of Newport, Arkansas, and the City of Joplin, Missouri, and, so far as her general duties were concerned as station agent, we presume it would be said that respondent was employed in interstate commerce.

This petition further alleges (R. 3):

> "That in the discharge of her duty to defendant she did go to said station and delivered to said train and received from said train express, mail, and messages, such as said train delivered and received at said station, and while returning from said train to said station she fell upon the platform," etc.

The duty mentioned in this allegation may have been true as a general proposition, but the testimony of respondent discloses that she did not deliver any express, mail, or messages to this train on the morning of the accident and was not injured while returning to the station after having either delivered to, or received from, said train express, mail and messages. It appears from the evidence (R. 38 and 39) that some mail or express was placed on this truck upon arrival of the train, but a companion of respondent's carried same into the station in her hands. The truck was not moved away from the edge of the platform. At the moment of her injury respondent was not engaged in the performance of any duty for petitioner, for which reason, and for other reasons herein referred to, we contend that the case is not brought within the provisions of the Federal Employers' Liability Act by the facts proved.

The Act of Congress known as the Federal Employers' Liability Act creates two rights of action for damages for injuries suffered by employes of a carrier engaged in in-

terstate commerce, depending upon the agency causing the injuries; first, if the injury results in whole or in part from the negligence of any of the officers, agents, or employes of such carrier; or, second, by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, **works**, boats, wharves or other equipment.

It is not averred in the petition, nor is there any proof, that respondent's injury resulted, "in whole or in part, from the negligence of any of the officers, agents or employes of" petitioner.

If the judgment of the Supreme Court of Missouri can be sustained upon the theory of an alleged violation of any of the provisions of this act, it is because the case comes within the terms of the second clause. Under that clause of the act the injury must have resulted from some "defect or insufficiency, due to the carrier's negligence," in the appliances mentioned in the statute. A station platform is not specifically mentioned therein, nor does any word appear which can be construed to include a station platform, unless it be the word "works," and it is our contention that that word, as used in the statute, pertains to structures owned or operated by the carrier, similar to machine shops, roundhouses or others of like character, and was not meant to include a station platform.

Obviously, this act was passed for the protection and in the interest of persons employed by common carriers by

railroad who are exposed to the hazards directly or indirectly incidental to the work of operating trains.

In the respects by which it changed the common-law rights and obligations of the parties affected by it this act is somewhat drastic. It creates new causes of action and destroys former common-law defenses in bar of such causes of action. It affects the jurisdiction of district courts of the United States.

When the character and purpose of this act are considered, we submit that it was not the intention of the Congress, in so far as that intention may be gleaned from the language of the act, to provide either a new cause of action or to abolish the long-established common-law defenses in bar in favor of one who is injured by reason of the simple accident of slipping on some ice on a station platform, across which the injured person is walking, even though the owner of that platform chances to be a railroad company engaged in interstate commerce, and even though the usual employment of the person injured is in interstate commerce.

After she had completed the act of placing the truck at the edge of this platform and while leisurely walking across the platform upon a mission purely for her own convenience, we submit that respondent was subjected to no greater risk of injury, because of the sole circumstance that the platform was adjacent to a railroad station, than she would have been if this had been one of the sidewalks in the village away from petitioner's premises. The risk

of slipping upon ice on sidewalks at certain seasons of the year, regardless of whether or not the ice has been negligently permitted to accumulate on the sidewalk, is one to which any person may be subjected whether he works for an interstate carrier or not.

In Volume 10 of the Century Dictionary, at page 6976, the word "work," a noun, is defined as follows:

> "An establishment for manufacturing or for performing industrial labor of any sort; generally in the plural, including all the buildings, machines, etc., used in the required operations; as, ironworks—hence the plural is used as a collective singular, becoming then a singular article as, a large glassworks in the town."

Webster defines "work" (paragraph 6) as

> "a place where industrial labor of any kind is carried on; as a salt work; now esp. in plural form, but often used with singular construction, the structures, grounds, machinery, etc., of a manufacturing establishment, or, loosely, of any industrial concern; as, to visit an iron works; locomotive works; the waterworks of a town."

There are, or in recent years have been, in force in many of the states, statutes known as Employers' Liability Acts, most of which contain the words "ways," "works" or "machinery," and those words, as so used, have been construed by the courts.

Such a statute, in New York, provides that an employer shall be liable for an injury to an employe caused by "any defect in the condition of the ways, works or machinery," due to negligence chargeable to the employer.

In

Ripp v. Fuchs, 113 N. Y. Supp. 361, 364, 129 App. Div. 321,

the Court held that a wall in process of construction was neither "works," "ways" nor "means" within the contemplation of the statute.

In

Davis v. Plant, 138 N. Y. Supp. 145, 146,

construing the same statute, the Court held that a pole with a T-end used for lifting quarters of beef, which were suspended from an overhead track by a wheel and truck, was neither "ways, works, machinery nor plant" within the meaning of the statute.

In

Cahill v. Railroad, 190 Mass. 421,

plaintiff, an employe of the railroad company, went to its freight house to get a skid, to be used in unloading a freight car. He took a skid that was leaning up against a row of cotton bales, and as he removed the skid the bales fell over on him causing injuries for which he sued.

It was held that "the bales of cotton as they were piled or stored in the freight house did not constitute a part of the ways, works or machinery."

In

McGowan v. New York Contracting Co.,
127 N. Y. Supp. 532, 143 App. Div. 1,

plaintiff, employed in a trench, was injured by an explosion of dynamite in one of several holes which had been drilled in the rock through which the trench was being cut, and suit was brought charging, in part, negligence of defendant in not observing the Employers' Liability Act of New York.

In holding that there could be no recovery, the Court said:

> "There is no defect charged with respect to 'works' or 'machinery,' but it is quite clear that there were no 'ways, works or machinery' furnished or provided by the master. It would not do to hold that the rock in which the holes were drilled, and which was being constantly blasted away, was provided by the master as a 'way' for the use of the employes and argument is not needed to demonstrate that neither the rock in which the hole was drilled, nor the dynamite which was inserted in it, was any part of the 'works' or 'machinery' furnished or provided by the master for use in its business."

The Supreme Court of Missouri had occasion to construe this act, with respect to this precise question, in

Elliot v. Payne, 293 Mo. 591, 239 S. W. 851.

In that case a locomotive fireman, while attempting to alight from his engine on a station platform, slipped on some ice on the platform and was fatally injured. His administratrix sued under the Federal Employers' Liability Act, and the Court held that there could be no recovery for the reason that, as to deceased, the station platform was not embraced within the appliances or equipment for a "defect or insufficiency" in which the defendant was charged with liability.

Attention was directed in the opinion to the fact that the first Federal Employers' Liability Act, the Act of 1906, included the word "ways" preceding the word "works" and concluded with the latter word, whereas the present act (the Act of 1908) the word "ways" was omitted and the words "boats, wharves and other equipment."

It was further said that this act undertook to change and modify the common law; that it created liability where there was none at common law; that it destroyed defenses which were recognized at common law; that it made acts of the master negligence which were not his negligence at the common law. The Court then proceeded:

"Suppose the statute (in its second specification of negligence) had stopped with the words 'cars, engines, appliances, track, roadbed,' could it be said that a defective station platform would be an actionable negligent act of a defendant under the statute? We think not, because it would not fall within any of the terms thereof. If not, then there could be no action under the Act of 1908 and its subsequent amendment in 1910 for such neglect or negligence. Congress, as ruled by the courts, had the power to pass the law, and, of course, had the right to limit the things defects in which should constitute negligence. Congress could have limited the law to engines, cars, tracks and roadbeds. If it had, defects in appliances other than those named would not be actionable under the statute. For action thereon the party would be relegated to his common-law rights. In other words, the right to sue under this act is limited to the things mentioned in the law, and if a depot platform maintained chiefly for the general public, rather than the employes of the railroad, does not fall within the act, then there was no actionable negligence. We have indicated above that a depot platform would not fall under the terms 'cars, engines, tracks, roadbed or appliances.' The ordinary meaning of these words is well understood. The remaining words used are 'machinery, works, boats, wharves or other equipment.' It is clear that a depot platform would not fall under the head of either 'machinery,' 'wharves' or 'boats,' so that we have left the words 'works' and 'other equipment' * * *.

"If a depot platform falls within the terms of the federal act at all, it must be that the word 'works,' as

used therein, includes it. If not, it is beyond the purview of the statute."

Discussing the use of the word "works," as used in this act, the Court further said:

"If it was so used there was no use in using the words 'tracks, roadbed or wharves.' If the word 'works' was intended to cover 'all the real estate, buildings and machinery used in the particular business' as held by some state courts under the peculiar wording of their statutes, the Federal Congress should have used the word 'works' and quit. The meaning of the word in this federal act must be measured by the use of it in connection with the other words used. When so used it clearly has reference to working places other than the tracks, roadbed and their incidents. Railroads have repair shops, engine houses, warehouses, railway yards, switch yards and other working places wherein employes may be engaged in work for interstate commerce. It is evidently these places to which the word 'works' applies. It certainly does not apply to a depot platform, except so far as such platform may be used by the particular employe as a working place. The working place of an engineer or fireman is not on a depot platform. A switchman may have his working place in the yards, and other employes have theirs in shops and other working places along the line. But it is evident that a depot platform is not a working place for an engine fireman and therefore not within the term 'works' as used in the statute. So viewing it, we rule that the demurrer to the evidence should have been sustained in the instant case."

The Court further said:

> "A depot platform, so far as its general use by the public is concerned, is largely a passageway from the outside world to the trains of the company, and from those trains to places outside of railroad property. In a very limited sense it may be a working place for certain classes of employes. Those employes whose duties require them to unload passengers, baggage or freight might say that it was a working place, but to other employes it would be a mere way of ingress and egress."

It will hardly be denied that a station platform comes within the idea expressed by the word "ways." Undoubtedly it is a part of the "ways" of a carrier—a place of ingress to, or egress from, the station. We think some significance is to be attached to the fact that in the first Federal Employers' Liability Act (see Appendix) Congress expressly imposed liability upon a common carrier for a defect or insufficiency in its "ways," due to its negligence, whereas, in the present act Congress just as expressly failed to impose such liability.

It will doubtless be contended here that, because of the language used in the last paragraph quoted from the opinion in the Elliott case, supra, that case is authority for the assertion that as to this respondent, the station platform was her working place and therefore within the act.

As to that argument we merely observe that: First, the language quoted was used solely by way of argument or

comparison and was not pertinent to any question submitted for decision. It is merely dictum.

Secondly, the act does not refer to "working places," but to "works."

Thirdly, respondent was not, at the time of her injury, engaged in unloading "passengers, baggage or freight" so that it "might" be said that this platform was, for her, a working place. Her principal working place was in the depot. At the time of her injury and until the train arrived she was not at work and had no duties to perform. To her at that time this plaform was "a mere way of ingress and egress"—a "way"—being so used by her for her own convenience.

It will also be argued, in all probability—the argument was submitted in opposition to the issuance of the writ of certiorari herein—that petitioner is precluded from insisting upon this contention because, in its answer, it admitted that the parties were engaged in interstate commerce and that the train mentioned in respondent's petition was operated between Newport, Arkansas, and Joplin, Missouri. It is also a fact that, as to her general duties, respondent was employed by petitioner in interstate commerce.

Those facts, whether admitted in the pleadings or established by the proof, are not alone sufficient to make the provisions of this act applicable to any case, or to preclude the contention that the rights of the parties are not to be determined by the act.

If the facts alleged in her petition were true respondent was in the discharge of some duty for petitioner at the time of her injury, but, as stated, the evidence established that she neither delivered to, nor received from, the train any express, mail or messages.

Respondent placed the truck in position to receive such matter, if the train had any, for that station. In so far as her work with reference to the receipt of express or mail matter from this train was concerned—no such matter was delivered, for the truck was empty when she placed it—it had been for the moment completed. She had no further duty to perform until the train arrived and because the weather was cold she chose to return to the station to there await the arrival of the train, all for her own convenience (R. 38 and 39). She was not, as she alleged, in the performance of any duty for petitioner at the time of her injury.

We submit, therefore, that for the reasons that a station platform is not within the objects with respect to which petitioner, if negligent, was liable under this act and that respondent, at the time of her injury, was not performing any duty for petitioner, there can be no recovery, under this act, even though the admissions referred to were made, and even though, as said by the Supreme Court, petitioner requested an instruction on contributory negligence. If the reasonable construction of this act does not render it applicable to this case it cannot be made so by admission or by requesting any particular kind of instruction.

Moreover, the record will show, first, the filing of a demurrer to the petition (R. 5); next, an objection to the introduction of any testimony for the same reason as assigned in the demurrer (R. 12), and, finally, the filing of demurrers to the evidence (in effect, motions for directed verdict because of failure of proof entitling plaintiff to recover) at the close of respondent's evidence and again at the close of all the evidence (R. 72 and 104).

According to Missouri practice those proceedings were the usual ones for raising the question of respondent's right to recover under both the pleadings and proof.

Their effect was to deny a right of recovery under this act.

II.

There Is a Failure of Proof of Facts Sufficient to Establish Actionable Negligence Causing Respondent's Injuries.

While we believe that our contention that the act is not applicable to this case will be sustained, we shall from this point argue this case upon the assumption, for the purpose of the discussion only, that it is within the act.

Accordingly, our next contention is that the undisputed evidence wholly fails to establish any actionable negligence which operated as the proximate cause of respondent's injuries, either under the provisions of the act or under applicable rules of the common law.

Referring to this act this Court, in

New York Central Railroad Co. v. Chisholm,
268 U. S. 29,

said:

> "It only undertakes to impose liability for negligence, which must be shown by proof."

In

Seaboard Air Line Railway Co. v. Horton,
233 U. S. 492,

it was said (referring to the first section of this act):

> "This clause has two branches: the one covering the negligence of any of the officers, agents or employes of the carrier, which has the effect of abolishing in this class of cases the common-law rule that exempted the employer from responsibility for the negligence of a fellow employe of the plaintiff; and the other relating to defects and insufficiencies in the cars, engines, appliances, etc. But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employes for defects and insufficiencies not attributable to negligence. The common-law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employes is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the work-

men (cases cited). To hold that under the statute the railroad company is liable for the injury or death of an employe resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common-law rule, certainly the act now limits the responsibility of the company as indicated."

In

Looney v. Railroad Co., 200 U. S. 480,

the Court said:

"A defect cannot be inferred from the mere fact of an injury. There must be substantive proof of the negligence. Knowledge of the defect or some omission of duty in regard to it must be shown. * * * But the negligence of a defendant cannot be inferred from presumption of care on the part of the person killed. A presumption in the performance of duty assists the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another."

In

Patton v. Railway Co., 179 U. S. 658, l. c. 663,

the Court said:

"The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employe to estab-

lish that the employer has been guilty of negligence (case cited). Second. That in the latter case it is not sufficient for the employe to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was and where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which he is not, it is not for the jury to guess between those half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. Third. That while the employer is bound to provide a safe place and safe machinery in which, and with which, the employe is to work, and while this is a positive duty resting upon him, and one which he may not avoid by turning it over to some employe, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe (cases cited). He is bound to take reasonable care and make reasonable effort, and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place, or the machinery."

With respect to the acts or omissions which may be said to constitute actionable negligence, it is immaterial whether the action be under the last clause of the Federal Employers' Liability Act or at common law. Negligence, under the act, merely relates to the objects therein specified. When any of those objects are involved the question of negligence is to be determined by the usual common-law rules of negligence, including knowledge either actual or constructive of the alleged negligent condition; the extent, if any, to which that condition is due to a failure to exercise ordinary care; whether the injury could have been prevented by the exercise of ordinary care and whether the negligence alleged caused the injury.

Now, what are the facts established by respondent's testimony?

When she went to work at this station, some six months before her injury, there was a depression or ditch in front of the entrance to the station which wore "more and more" while she worked there (R. 55).

During all this time it was a part of her daily duties to, and she did, place the truck in position near the tracks, necessitating her moving it and her walking back and forth across this platform. Every morning she stepped across this depression (R. 57).

She was never injured before while attempting to step across this depression and on the occasion of her injury she did not fall because of attempting to step across the ditch.

The cause of her injury was slipping on the ice.

This is her testimony:

> "Q. And as you came along to this trench or ditch or drain, or whatever you call it, you stepped in that and your foot slipped?
>
> A. Yes, sir.
>
> Q. Slipped on the ice that had formed there during the night before?
>
> A. Yes, sir.
>
> Q. And that was what caused you to fall?
>
> A. Yes, sir" (R. 58).

It is undisputed that, at as late as 10 o'clock the night before, this platform was dry and there was no water in this depression. The ice on which respondent slipped formed in this depression during the eight hours between 10 o'clock on the night of January 12 and 6 o'clock in the morning of January 13. During those eight hours no employe of petitioner was near this station except respondent.

This record contains no evidence of any attempt to show that petitioner either knew, or by the exercise of ordinary care could have known, of the accumulation of ice or that any opportunity, within the limits of ordinary or reasonable care, was ever afforded petitioner to remedy the condition and to have thereby prevented respondent's injuries.

We submit, therefore, that, for this reason alone, there should be a reversal of the judgment.

III.

The Undisputed Evidence Discloses That Respondent Assumed the Risk.

If the facts in this case bring it within the provisions of the Federal Employers' Liability Act, then certain principles well settled by the decisions of this Court are applicable, namely: (1) the provisions of that act supersede any state laws or decisions which might otherwise determine the rights of the parties to this suit; (2) the common law, by which the question whether or not respondent assumed the risk is to be determined, is the common law declared by this Court, and not that declared by the state courts, and (3) under numerous decisions of this Court respondent assumed the risk, not only of those injuries ordinarily incidental to her occupation, but also of those injuries which were likely to result from conditions arising from petitioner's negligence, which respondent knew and appreciated, or which were so obvious that, as a reasonably prudent person, she should have known and appreciated. (There is no contention that any statute enacted for the safety of employes was violated by petitioner.)

In

Seaboard Air Line Ry. Co. v. Horton,
233 U. S. 492, l. c. 503-4,

it was held that section 4 of said act, in eliminating the defense of assumption of risk in the cases indicated,

"quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action."

It was there said:

> "Some employments are necessarily fraught with danger to the workmen—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this Court" (cases cited).

In the later case of

Boldt, Adm., v. Pennsylvania R. R. Co., 245 U. S. 441, l. c. 446,

this Court said:

> "The risk held to have been assumed in the Horton case certainly arose from negligence of some officer,

agent or employe; and if the negligence of all these should be excluded in actions under the Employers' Liability Act, it is difficult to see what practical application could ever be given in them to the established doctrine concerning assumption of risk."

In

Chicago Rock Island & Pacific Railway Company v. Ward, 252 U. S. 18,

this Court said:

"As to the nature of the risk assumed by an employe in actions brought under the Employers' Liability Act, we took occasion to say, in Chesapeake & Ohio Ry. Co. v. De Atley, 241 U. S. 310, 315, 'According to our decisions, the settled rule is, not that it is the duty of an employe to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employes may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.'"

In

Pryor v. Williams, 254 U. S. 43,

this Court reversed a judgment of the Supreme Court of Missouri for the reason that that Court there held, as it held in this case, that the defense of assumption of risk

could not be interposed as a bar to an action brought under the Employers' Liability Act.

In that case respondent Williams, plaintiff in the action, was engaged in tearing down a bridge on the line of the railroad and a defect in a claw bar, which he was directed to use, caused the bar to slip while he was attempting to draw a bolt; in consequence, he lost his balance and fell to the ground, a distance of 12 feet. The defect, it is alleged, Williams did not know. Negligence, however, was charged against him and assumption of risk and contributory negligence.

He was ordered by the foreman in charge of the work to use a claw bar which was defective in that the claws "had become so rounded and dull by long usage that they could not be made to grip the shank securely and slipped from their hold when plaintiff (Williams) pressed downward on the handle, causing him to lose his balance and fall from the cap to the ground."

The plaintiff testified that to discover the defect required an inspection of the underside of the tool and that, in obeying the order of the foreman, he did not pause to make such inspection, but used the tool without any but casual inspection of its top surface, which did not reveal the defect.

The suit was based upon an alleged violation of provisions of the Federal Employers' Liability Act. Williams recovered and the cause was appealed to the Kansas City Court of Appeals.

The view of the Court was that "the defect in the claw bar was so obvious that the most cursory and superficial inspection would have disclosed it to the plaintiff" and that "the risk was just as obvious as the defect; that the tool was a simple one which in the course of use would be expected to fall into such defective condition and plaintiff must be held to have appreciated the danger and to have voluntarily assumed it."

A majority of the Court reversed the judgment, but because one of the Judges deemed the decision of the majority to be in conflict with a decision of the Supreme Court the case was certified to that court for its determination.

The Supreme Court ruled differently upon the issue of assumed risk, holding that that defense was not available in bar of the action. The case was then brought to this court, where the judgment of the Supreme Court of Missouri was reversed. It was here said:

> "In its view of the federal statute and the defence under it, the Court erred (Seaboard Air Line Railway v. Horton, 223 U. S. 492; Jacobs v. Southern Ry. Co., 241 U. S. 229; Chesapeake & Ohio Ry. Co. v. De Atley, 241 U. S. 310; Erie R. R. Co. v. Purucker, 244 U. S. 320; Boldt v. Pennsylvania R. R. Co., 245 U. S. 441).
>
> "And the requirement of the act prevails over any state law (Seaboard Air Line Railway v. Horton, supra; Atchison, Topeako & Santa Fe Ry. Co. v. Harold, 241 U. S. 371; New York Central R. R. Co. v.

Winfield, 244 U. S. 147; New Orleans & Northeastern R. R. Co. v. Harris, 247 U. S. 367)."

Referring to the action of the trial court in refusing an instruction requested by the defendants upon the issue of assumption of risk it was further said:

> "The Court was requested to instruct the jury that the effect of the assumption of risk by Williams, incident to the use of the claw bar, and the circumstances under which it was used, was to relieve defendants from liability 'for the injury resulting therefrom.'
>
> "The Court refused the instruction as it was requested and amended it by adding thereto 'and such fact (the assumption of risk) will be considered by you in determining the amount of plaintiff's recovery, if any, under all of the instructions.'
>
> "The refusal and modification were assigned as error and the Supreme Court considered and decided, as we have seen, that the fact was of no determining importance and, if it existed, only constituted contributory negligence, and could operate only in reduction of the amount of recovery, not defeat recovery. This was error as we have seen."

In

Chesapeake & Ohio Railway Company v. Nixon, 271 U. S. 218,

a recovery for damages was sought under this Act for the death of a section foreman resulting from injuries sus-

tained by him while riding on a velocipede and caused by being struck by a train.

Deceased was an experienced section foreman upon the defendant's road. One of his duties was to go over and examine the track and to keep it in proper repair. When inspecting the track he used the velocipede, which was propelled by him.

He had obtained, from his immediate superior, the supervisor of track, leave to use the machine also in going to his work from his house, about a mile distant, over a part of the track that was in his charge. His work began at 7 in the morning and at half-past 6 on the day of his death he started as usual. Five minutes later he was overtaken by a train and killed.

In holding that there could be no recovery, this Court said:

> "For reasons that the jury found insufficient to excuse the omission, the engineer and fireman of the train were not on the lookout, and the question raised is whether, as toward the deceased, the defendant owed a duty to keep a lookout, or whether, on the other hand, the deceased took the risk.
>
> "If the accident had happened an hour later when the deceased was inspecting the track we think that there is no doubt that he would be held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The railroad company was entitled to expect that self-protection

from its employes. (Cases cited.) The duty of the railroad company toward this class of employes was not affected by that which it might owe to others.

"The permission to use the velocipede in going to his work did not make the defendant's obligation to the deceased greater than it would have been after he got there. * * * It was a trifling incident of daily life by which a subordinate officer of the company allowed one lower in grade to enlarge his customary use of the machine by an hour for his own convenience, although even then, in the opinion of the Court of Appeals of Virginia, already engaged in his duties. It seems to us to have been no more than an extension of his ordinary rights and his usual risks."

These rules have been announced by this Court in many cases since the Horton case was decided, among which are the following::

Jacobs v. Southern Railway Co., 241 U. S. 229;
Chesapeake & Ohio Ry. Co. v. De Atley, 241 U. S. 310;
Chesapeake & Ohio Ry. Co. v. Proffitt, 241 U. S. 462;
Chicago, Rock Island & Pacific Ry. Co. v. Ward, 252 U. S. 18;
Erie R. R. Co. v. Purucker, 244 U. S. 320;
Boldt v. Pennsylvania R. R. Co., 245 U. S. 441;
Pryor v. Williams, 254 U. S. 43;
Chesapeake & Ohio Ry. Co. v. Nixon, 271 U. S. 218.

In the Jacobs case (241 U. S. 229) the plaintiff was engaged with a crew in shifting cars in the company's yard. He descended from the engine to get drinking water for

himself and the engineer. He returned with a can of water, to mount the engine and tripped on a pile of cinders and fell under the engine. He had often attempted to board engines while they were moving. The cinder pile was about 18 or 24 inches deep. The cinders were right up against the rail and sloped from the rail up. He testified that he knew that the cinders were there, but did not know that it was dangerous, and that, at the moment of his injury, he had forgotten that they were there. In holding that plaintiff was not entitled to recover, this Court said:

> "He admitted a knowledge of the 'material conditions' and it would be going very far to say that a fireman of an engine who knew of the custom of depositing cinders between the tracks, knew of their existence, and who attempted to mount an engine with a vessel of water in his hands holding 'not over a gallon' could be considered as not having appreciated the danger and assumed the risk of the situation because he had forgotten their existence at the time and did not notice them."

In view of the law as declared in these decisions, and assuming, for the purpose of this discussion, that this case comes within the provisions of the Federal Employers' Liability Act, we submit that respondent assumed the risk of injury due to the condition of the station platform complained of, even though, as the Supreme Court of Missouri thought, the testimony may have tended to

establish that such condition existed as the result of petitioner's negligence and, we contend, the testimony of respondent so shows.

Respondent entered the employ of petitioner, at this station, on July 2, 1920, and there continued in service until the 13th of January, 1921, at which time she was injured. Her testimony is that, when she went to work at this place, there was a depression or ditch in front of the door leading to the station, and that it remained there, varying in size at different times, until the date of her injury (R. 55). During all of that time, whenever rain fell, it fell into this depression (R. 28). In response to the question, asked her by her own counsel, as to the cause of this depression or drain, she answered: "By the passage of people passing in and out, and also by the water running in front of the door" (R. 19). Respondent further testified, on her direct examination, that she had observed rains before the day of the accident on the platform; that she had observed that water would run before the door; that the water struck into the platform, and that the platform absorbed the water (R. 28).

On cross-examination she testified that from July, 1920, until January, 1921, rain had fallen on several occasions in that vicinity; that she had observed that when it fell the rain fell from the roof and made this ditch or drain in front of the station; that when the rain would first fall the water would accumulate in front of the station, and then later the ditch would absorb it or it would run

away; that she had often noticed this condition whenever it rained (R. 35).

On recross-examination, respondent testified that this depression got wider and deeper from July, 1920, until January, 1921; that it wore out the last month; that the more rain fell, the deeper it would wear (R. 68); that the rain had washed it out some the night before she was hurt; that the rain washed it deeper that night (R. 69). And again, on recross-examination, she testified that every morning when she was on duty she moved the truck out to the north edge of the platform next to the tracks to meet the morning train (R. 69); that she would move the truck out and then go back to the station and wait for the train; that every morning, when she would go back from the truck to the station, she had to step over this ditch or drain; that she saw water in the drain, and that on occasions, when there was water in the drain, she stepped across it onto the steps leading to the station (R. 70).

When she arose on the morning of the accident she already knew that it had rained during the night. The moment that she stepped out of the station she observed that there were two or three inches of snow on the steps and as far as she could see from the depot; that the snow was all over town; that the two steps leading from the station were covered with snow; that, as she stepped off the steps to walk to the truck, she walked in the snow (R. 39); that, in arriving at the truck, she discovered that

there were snow and sleet on the truck; she saw where it had rained and frozen on the truck before it snowed; she and her companion moved the truck to the edge of the platform nearest the tracks (R. 40); when she came out of the station that morning she knew it was cold and was snowing; that she found out that it had frozen. She first noticed that it had frozen on the truck before she was injured (R. 52).

With respect to her knowledge of the conditions immediately before the accident she testified that she did not know the ice was before the door, but that she did know it had sleeted and snowed (R. 54). She knew the ice had formed on the truck; that it had been cold enough to freeze, and she knew if she stepped on any ice she was likely to slip (R. 54).

From the testimony of respondent the following facts bearing upon the defense of assumption of risk are deducible:

First. That she knew, at the time that she began work at this station, six months before she was hurt, all about the character of construction of the roof of the station and the existence and approximate size of the depression in the platform.

Second. That she was thoroughly familiar with the effect of the construction of the roof and the depression, namely, that when it rained water would accumulate in the depression and that it would remain there before running away or being absorbed by the chats.

Third. That she knew that it had rained shortly before her injury.

Fourth. That she also knew, before she was hurt, and as soon as she stepped out on the platform, that the weather was cold enough to freeze and that ice had formed on the platform and on other objects, such as the truck.

Fifth. That she knew it had snowed and was still snowing.

Sixth. That she was thoroughly familiar with the possibility and probability of slipping if she stepped on ice.

By her testimony she admits knowledge of all these facts. But she says she did not know that there was ice in this depression. Knowing that, whenever it rained, water would accumulate in the depression, and knowing that it **had** rained, and that ice had formed, and that snow was falling on everything on this platform and on the platform itself, is it imposing too great a burden upon this respondent for the law to say that she should, in the exercise of that reasonable care which the law demands of all persons, have known that there was undoubtedly ice in this depression and that, in the exercise of the same care, she had it within her power, and should have used it, to have avoided the possibility of her injury by doing as she had always done theretofore, namely, by taking care to step clear across the depression?

We submit that this question should be answered by a holding that respondent assumed the risks of her employment and cannot therefore recover.

IV.

Respondent's Carelessness Was the Sole Cause of Her Injuries.

We shall spend but little time upon this point.

The law, as declared by this Court, in the cases of Great Northern Railway Co. v. Wiles, 240 U. S. 444; Frese v. Railroad Co., 263 U. S. 1, and Davis v. Kennedy, 266 U. S. 147, is that if an injury is solely due to carelessness of the injured, he cannot recover even under the Federal Employers' Liability Act.

The principle announced in the Davis case, if we understand it correctly, is equally applicable to this case. It was there said:

> "It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary as he had physical control of No. 4 and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act, as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more."

Here respondent had been practically in sole charge of this station for six months before she was hurt. The depression did not alone cause her to fall. She had daily demonstrated that no danger existed in stepping across it because she performed that very act daily without mishap.

On this occasion instead of stepping clear across it, she stepped and slipped on the ice in it (R. 58).

Whether she had express and formal authority to do so, the fact remains that she herself ordered the section man to remove the snow from this platform the next day and he obeyed her order (R. 40). It is folly to argue that if she considered this depression as at all dangerous she could not have reported the condition in such manner and to such source as to have assured its repair. It, however, remained there during the entire time of her employment without complaint from or report by her, and on the morning of the accident she could have as easily stepped across it as upon any of the other prior occasions, if she had herself been in the exercise of ordinary care. There is no evidence that upon any prior occasion she ever failed to step all the way over it.

In conclusion we call attention to the fact that one of the acts of negligence alleged was failure to sufficiently light this platform. There is a failure of proof not only of that allegation but also of any causal connection between such alleged negligence and respondent's injury and the submission of that allegation as a ground of recovery was not requested by respondent. (See Instruction, R. 106 and 107.)

However, respondent's testimony establishes that, on this morning, the usual lights were burning inside the depot and at the windows; that she had a lantern already

lighted which she could have carried with her while walking across the platform (R. 32 and 33).

It is inferable from all the evidence that the natural light was sufficient to make artificial unnecessary.

At any rate, the same conditions with respect to light existed on this morning as on other days at the same hour (R. 57).

Respondent knew better than petitioner just how dark it was, if it was dark, and whether she needed artificial light. She did not choose to use the artificial light which petitioner furnished—doubtless because it wasn't necessary. However that may be, we contend that she certainly assumed whatever risk existed by reason of alleged insufficient light.

For the various reasons herein discussed, we most respectfully submit that respondent is not entitled to recover and that the judgment of the Supreme Court of Missouri should be reversed.

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APPENDIX.

Federal Employers' Liability Act Now in Force.

The act whose validity is drawn in question (35 Stat. at L. 65, Chap. 149 U. S. Comp. Stat. Supp. 1909, p. 1171), and the Amendment of April 5, 1910 (36 Stat. at L. 291, Chap. 143), are as follows:

An Act Relating to the Liability of Common Carriers by Railroad to Their Employes in Certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad, while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for any such injury or death resulting, in whole or in part, from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

Sec. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal zone, or other possessions of the United States, shall be liable in damages to any person suffering in-

jury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting, in whole or in part, from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act, to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: Provided, That no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

Sec. 5. That any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed, or paid to any insurance, relief, benefit or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought.

Sec. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

Sec. 7. That the term "common carrier" as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Sec. 8. That nothing in this Act shall be held to limit the duty or liability of common carriers, or to impair the rights of their employes under any other Act or Acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the Act of Congress entitled, "An act relating to liability of common carriers in the District of Columbia and territories, and to common carriers engaged in commerce between the states and between the states and foreign nations to their employes," approved June eleventh, nineteen hundred and six (34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1909, p. 1148).

Approved April 22, 1908.

An Act to Amend an Act entitled, "An Act relating to the liability of common carriers by railroad to their employes in certain cases," approved April twenty-second, nineteen hundred and eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That an Act entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

"Sec. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

Sec. 2. That said Act be further amended by adding the following section as section nine of said Act:

"Sec. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe; but in such cases there shall be only one recovery for the same injury."

Approved April 5, 1910.

First Federal Employers' Liability Act Declared Unconstitutional.

The first Act of Congress, known as a Federal Employers' Act, was approved June 11, 1906 (32 Stat. 232), and provided (Section 1) in part as follows:

> "That every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states * * * shall be liable to any of its employes * * * for all damages which may result from the negligence of any of its officers, agents or employes, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, ways or works."

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,
vs.
MARY I. AEBY,
Respondent.

No. [redacted]

SUGGESTIONS IN OPPOSITION TO WRIT OF CERTIORARI.

AUGUSTUS L. ABBOTT,
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SUGGESTIONS IN OPPOSITION TO WRIT OF CERTIORARI.

The opinion of the Supreme Court of the State of Missouri filed in this case states the facts so fully and states the applicable law so clearly, cogently and unequivocally that we believe that a reading of the opinion will demonstrate at once that the present petition is based upon a misconception of the pleadings and evidence in the case and a misinterpretation of the rulings of the Supreme Court of the State of Missouri. It is our purpose in submitting the following brief suggestions in opposition to the issuance of a writ of certiorari, merely to direct the

attention of the Court to the portions of the record which demonstrate the errors which underlie petitioner's application for the writ.

I.

The first point raised by petitioner is that the pleadings and proof do not show a case falling within the provisions of the Federal Employers' Liability Act, and that respondent's remedy, if any, is at common law.

This argument comes with a certain amount of lack of good grace on the part of petitioner. This suit was originally brought as an action at common law. Petitioner joined issue by filing an answer in the nature of a general denial. Shortly before the date set for the trial of the case petitioner filed an amended answer, alleging, among other things, that at the time of respondent's injury petitioner was engaged in interstate commerce and respondent was employed by petitioner in interstate commerce and pleading the defense of assumption of risk as enunciated in the decisions of the federal courts construing the Federal Employers' Liability Act. Respondent was thus placed in a position of being compelled to elect to proceed either at common law or under the Federal Employers' Liability Act, an unenviable position. In attempting to avoid Scylla respondent must face Charybdis. If respondent proceeded under the common law, petitioner would contend that the Federal Employers' Liability Act applied and that respondent was not entitled to recover at common law; if respondent proceeded under the Federal Act petitioner would contend, as it now contends, that the action should be at common law. After a careful consideration of the facts and the applicable authorities, counsel for respondent concluded that the case fell within the purview of the Federal Employers' Lia-

bility Act and filed an amended pleading (designated an "amended petition" under the Missouri practice) designed to set up a cause of action under the Federal Employers' Liability Act (Rec., p. 6).

Petitioner joined issue by filing an answer admitting that petitioner was at all times mentioned in respondent's amended petition engaged in interstate commerce, and admitting that "at all such times, **as well as at the time of her alleged injury,**" respondent was employed by petitioner in interstate commerce, to wit, as a station agent at Magness, Arkansas, and admitting that the particular train mentioned in respondent's petition to which respondent **"was required to deliver and from which she was required to receive** express, mail and baggage" was an interstate commerce train (Rec., p. 10). In the third paragraph of its answer petitioner again admits that it was engaged in interstate commerce, and that at all times mentioned in respondent's amended petition, **"as well as at the time of her alleged injury,"** respondent was employed by petitioner in interstate commerce (Rec., p. 11). Under the Missouri practice this admission dispensed with the necessity of proof that respondent was engaged in interstate commerce at the time she was injured (State v. Adler, 97 Mo. 413).

No contention was made in the trial court that the common law applied, as is shown by the record of the proceedings in the trial court, but the trial proceeded and instructions were offered by both parties and were given by the Court on the theory that the Federal Employers' Liability Act applied. The point that the common law applied and not the Federal Employers' Liability Act was raised for the first time on appeal to the Supreme Court of the State of Missouri. But even there no con-

tention was made that respondent was not employed in interstate commerce at the time of her alleged injury.

In this court, **for the first time**, petitioner raises the point that respondent at the time of her alleged injuries was not employed in interstate commerce, but was walking back across the platform, "**presumably** for her own convenience, and while she was not performing any act of service," and proceeds to base its argument upon this assertion of fact. It is apparent that the position of petitioner at this time and in this Court is contrary to the solemn admission which it made in the answer filed in the Circuit Court of the City of St. Louis, Missouri, in which it specifically admitted that at the time of her alleged injuries respondent was employed in interstate commerce. It is contrary to the position taken by petitioner at the trial of the case in requesting the Court to give and having the Court give its instructions Nos. 3, 4 and 5 (Rec., pp. 138 to 140). It is contrary to the position taken by petitioner in the Supreme Court of Missouri, as is shown by the quotation of the Court from the brief filed by petitioner in that court (Rec., p. 163). And, finally, it is an assertion unfounded upon any testimony in the case and conclusively decided against petitioner by the verdict of the jury. As stated in the opinion of the Supreme Court of the State of Missouri (Rec., p. 159), respondent testified that she was returning to the station after having moved the truck across the station platform and placed it in position to receive baggage, express and mail from train No. 214, which was due at the station in a few minutes and which petitioner admits was an interstate commerce train (Rec., p. 23). It is true that after petitioner was injured she was unable to go to the truck to remove the express, mail and baggage placed upon it from train No.

214, but this in no wise militates from the fact that at the time she received her injuries she was engaged in interstate commerce. There is not a single iota of testimony in the entire record that respondent was walking across the platform or doing anything else for her own convenience, either "presumably" or otherwise. The jury, under instruction No. 1, was required to find, and did find, that it was plaintiff's duty to pass over and along the platform in question to receive express, mail and other things from passing trains and to place a truck in position for the receipt of same, and the jury was required to find and did find that respondent fell and was injured while in the course of her employment (Rec., pp. 136, 137).

Certainly a litigant, in appealing to the conscience of a Court and asking for the issuance of a discretionary writ, should not be permitted to take a position based upon an assertion of the supposed existence of a state of facts which is contrary to its solemn admission in open court, contrary to its position taken at the trial of the case and contrary to the position taken on appeal and accordingly we believe that this Court might well disregard the whole of petitioner's argument, based as it is upon a set of facts which does not exist.

This Court, in all of its decisions, has taken the position that where a servant is injured while a railroad is engaged in interstate commerce and the servant is employed in interstate commerce the Federal Employers' Liability Act applies, and, under the admissions of petitioner in this case and the applicable decisions of this Court, petitioner's argument that the case does not fall within the act is utterly groundless (Pederson v. Delaware etc. R. R., 229 U. S. 146; Second Employers' Liability Cases, 223 U. S. 1; Missouri etc. Ry. Co. v. Wulf, 226 U. S. 570; Industrial Accident Commission v. Davis, 259 U. S. 182). The

case of Elliott v. Payne, 293 Mo. 581, contains no contrary holding, but, as pointed out in the opinion of the Supreme Court of Missouri in this case (Rec., p. 163), it merely holds that a station platform is not ordinarily the working place of a locomotive fireman, and that a locomotive fireman who steps from his engine for a purpose not shown to have been in the course of his employment cannot claim that the station platform is his working place so as to come within the terms "cars, engines, appliances, machinery, track, roadbed, works, boats, wharfs or other equipment," as used in the Federal Employers' Liability Act. This is shown by a reading of the headnotes to the case as prepared by the Court. Moreover, the Missouri Supreme Court, by way of dictum, stated that a station platform was the working place of an employe who was required to deliver and receive express, mail and baggage from trains, and this dictum was followed by the Missouri Supreme Court in the present case. There are numerous cases of this Court in which certiorari has been refused under similar circumstances, and there are numerous decisions of this Court holding that the Federal Employers' Liability Act is applicable under circumstances such as exist in this case. (See Baltimore & Ohio R. R. Co. v. Whitacre, 242 U. S. 169, affirming Baltimore & Ohio R. R. Co. v. Whitacre, 142 Md. 411, 92 Atl. 1002; Seaboard Air Line Ry. Co. v. Renn, 241 U. S. 290, affirming Renn v. Seaboard Air Line Ry. Co., 170 N. C. 128, 86 S. E. 964; Baltimore & Ohio R. R. Co. v. Fletchner, 200 Fed. 318, certiorari denied, 266 U. S. 613; Baltimore & Ohio R. R. Co. v. Kast, 200 Fed. 419, certiorari denied, 266 U. S. 613; Davis v. Scroggins, 284 Fed. 760, writ of error dismissed, 262 U. S. 734.)

Unless this Court is to undertake the burden of reviewing every case decided by a state court in which an em-

ployé is injured while the master is engaged in interstate commerce and the servant is employed in interstate commerce, merely because the carrier raises the issue that the instrumentality which causes the injury is not one included within the terms of the federal act, then certiorari should be refused in this case. There is no question of substance heretofore undecided, and there is no great public interest to appeal to the discretion of this Court, but we have a case of a petitioner reversing its position and, in the face of its own solemn admission, asking for a writ and appealing to the discretion of the Court on a fictitious state of facts.

II.

The second point raised by petitioner is that the Supreme Court of the State of Missouri erred in applying the law as to the doctrine of assumption of risk.

In order to support this contention petitioner asserts, on page 13 of its petition and on pages 19 and 21 of its brief in support of its petition for a writ of certiorari, that the Supreme Court of Missouri, instead of applying the federal doctrine of assumption of risk, applied the state law applicable in cases not falling within the federal act, and quotes an isolated portion of the opinion of the Court in support of such contention. A simple reading of the record and of the opinion of the Supreme Court of Missouri will demonstrate to this Court that petitioner is seeking to charge the Supreme Court of Missouri with an error which was never committed. This case was tried below and all the instructions were given under the federal doctrine of assumption of risk. As pointed out by the Supreme Court of Missouri, the instructions, in many respects, were too favorable to petitioner (Rec., p. 165).

The Supreme Court of Missouri pointed out that petitioner was negligent in the construction and maintenance of its platform, and that accordingly there was no state doctrine under which respondent would be charged with having assumed the risk of injury. It then proceeded to examine the pleadings and evidence in the case in the light of the federal rule of assumption of risk, quoting from Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492, the leading case decided by this Court on that question, and concluded that no grounds existed for disturbing the finding of the jury.

On page 21 of its brief in support of its petition, petitioner states that the Supreme Court of Missouri falls into the same error which resulted in the issuance of a writ of certiorari in the case of Pryor v. Williams, 254 U. S. 43. In the Pryor case the trial court refused to instruct on the doctrine of assumption of risk, and the Supreme Court of Missouri held that the question of assumption of risk was to be determined by the state law in cases where the federal act was not involved. In the present case the instructions were given in the trial court, and the case was reviewed on appeal under the federal rule. Accordingly, it is apparent that this case is in no respect similar to the case of Pryor v. Williams, and that petitioner, for the purpose of appealing to the discretion of this Court, is attempting to twist the opinion of the Supreme Court of Missouri and to give it an interpretation to which it is not susceptible.

A second phase of petitioners' argument apparently takes the position that even though the Supreme Court of Missouri applied the federal doctrine of assumption of risk it erred in not holding that as a matter of law respondent assumed the risk. At no place, either in its

petition or argument, does petitioner so state, but we glean from the confused jumble of statement of supposed facts and argument that some such contention is intended to be made. A reading of either the record in this case or the opinion of the Supreme Court of Missouri will demonstrate to this Court at once that the argument of petitioner in this respect is based upon a misconception of the facts and will demonstrate to this Court that the facts stated in petitioner's petition and brief and which petitioner claims to be the testimony of respondent herself are neither a complete statement nor an accurate statement of the evidence in the case.

The statement of petitioner in this respect is so inaccurate that we ask the indulgence of the Court in setting forth the testimony at some length. The station platform in question was dry when respondent retired on the night of January 12, 1921, and the exact hour at which it began to rain was unknown to respondent (Rec., p. 38). When respondent arose the next morning it was dark and the steps and station platform were covered with two or three inches of snow (Rec., p. 24). Respondent testified that she had no knowledge that there was ice in the depression in front of the station door (Rec., p. 54). It was dark and the ice was covered with snow (Rec., p. 27). It is true that respondent knew of the existence of the depression in front of the station door, and it is true that respondent knew that rain had previously collected in this depression, but the record shows that the chat which composed the station platform absorbed rain (Rec., p. 22) and unless respondent knew of the volume and duration of the rain she could not be charged with knowledge of its collection in the depression on this particular occasion. So is pointed out by the Supreme Court of Missouri in

its opinion (Rec., p. 158), there had been no freezing weather at Magness from the time respondent became station agent until this accident occurred (Rec., p. 20), and, of course, respondent had no actual knowledge that ice had ever formed in the depression or of the characteristics of the ice which did form. **The ice which formed in the depression was rough and uneven and presented an irregular surface** (Rec., pp. 46, 48 and 74). **The record shows conclusively that respondent was injured by tripping on a ridge in this rough, uneven ice** (Rec., pp. 46, 48). Certainly, under these circumstances, it cannot be said, as a matter of law, that the defect was so plain that an ordinarily prudent person was bound to observe it, and surely it cannot be said that the risk arising from the defect was so plainly observable that an ordinarily prudent person would have appreciated it. In the case of Seaboard Air Line Railway Co. v. Renn, 241 U. S. 290, affirming Renn v. Seaboard Air Line Railway, 170 N. C. 128, 86 S. E. 964, it was held that under similar circumstances an employe did not assume the risk of slipping and falling. There are numerous cases under the Federal Employers' Liability Act to the same effect. See

Cincinnati Railroad Co. v. Thompson, 236 Fed. 1;
Burdick v. Chicago etc. Railway Co., 123 Minn. 105, 143 N. W. 115;
Rogers v. Davis, 228 Pac. 339 (Idaho);
York v. Chicago etc. Railway Co., 184 Wis. 110, 198 N. W. 377;
Fitzgerald v. Great Northern Ry. Co., 157 Minn. 412, 196 N. W. 657.

And see also:

Bowen v. Wormsbo Mfg. Co., 105 Me. 31, 72 Atl. 685;
Fitzgerald v. Conn. River Paper Co., 155 Mass. 155, 29 N. E., l. c. 467.

Not a single case is cited by petitioner in which the facts are in any respect similar to the facts in this case. Moreover, it is the established rule of this Court that it will not disturb the concurrent findings of state trial and appellate courts on an issue of fact in the absence of some palpable error (Great Northern Ry. Co. v. Knapp, 240 U. S. 464; Baltimore & Ohio R. R. Co. v. Whitacre, 242 U. S. 169), and in view of this rule surely no basis exists for the issuance of a writ of certiorari.

III.

The final ground on which petitioner seeks a writ of certiorari is that respondent's own negligence was the sole cause of her injury.

As is pointed out by the Supreme Court of Missouri (Rec., pp. 159 and 164), respondent had nothing to do with the suggestion of or the making of repairs in or about the station or platform. The evidence on this point was all one way. Petitioner's own witnesses testified that it was the duty of the section men under the section foreman to make repairs of the station platform (Rec., p. 118). It was the duty of the section foreman to come around once a day observing the condition of things at the station (Rec., p. 118). Petitioner's division superintendent testified that he passed through Magness approximately every ten days on inspection trips (Rec., p. 92). He had under him a supervisor of bridges and buildings who had charge of the repair work and maintenance of stations (Rec., p. 93). It accordingly is apparent that it was not the negligence of respondent which caused the defect in the platform which led to the accumulation of the ice upon which respondent tripped and fell. Accordingly, even if it be assumed that respondent was

negligent in the manner in which she walked across the platform, which was by no means established, it would amount to mere contributory negligence which could be considered only in mitigation of damages. As is pointed out by the Supreme Court of Missouri (Rec., p. 169), this was the position taken by petitioner in offering and requesting the trial court to give instruction No. 5 and this is the position to which petitioner must be held on an appeal and in applying for a writ of certiorari in this court. None of the cases relied upon by petitioner present a situation in anywise analogous to the situation presented by the record in this case and afford no basis for the issuance of the writ prayed for.

We accordingly respectfully submit that the writ of certiorari should be denied.

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SUPREME COURT OF THE UNITED STATES.

[redacted]

OCTOBER TERM, A. D. 1927.

[redacted]

MISSOURI PACIFIC RAILROAD COMPANY,

Petitioner,

vs.

MARY L. AEBY,

Respondent.

No. 186.

[redacted]

On Writ of Certiorari to the Supreme Court of the State of Missouri.

[redacted]

BRIEF AND ARGUMENT FOR RESPONDENT.

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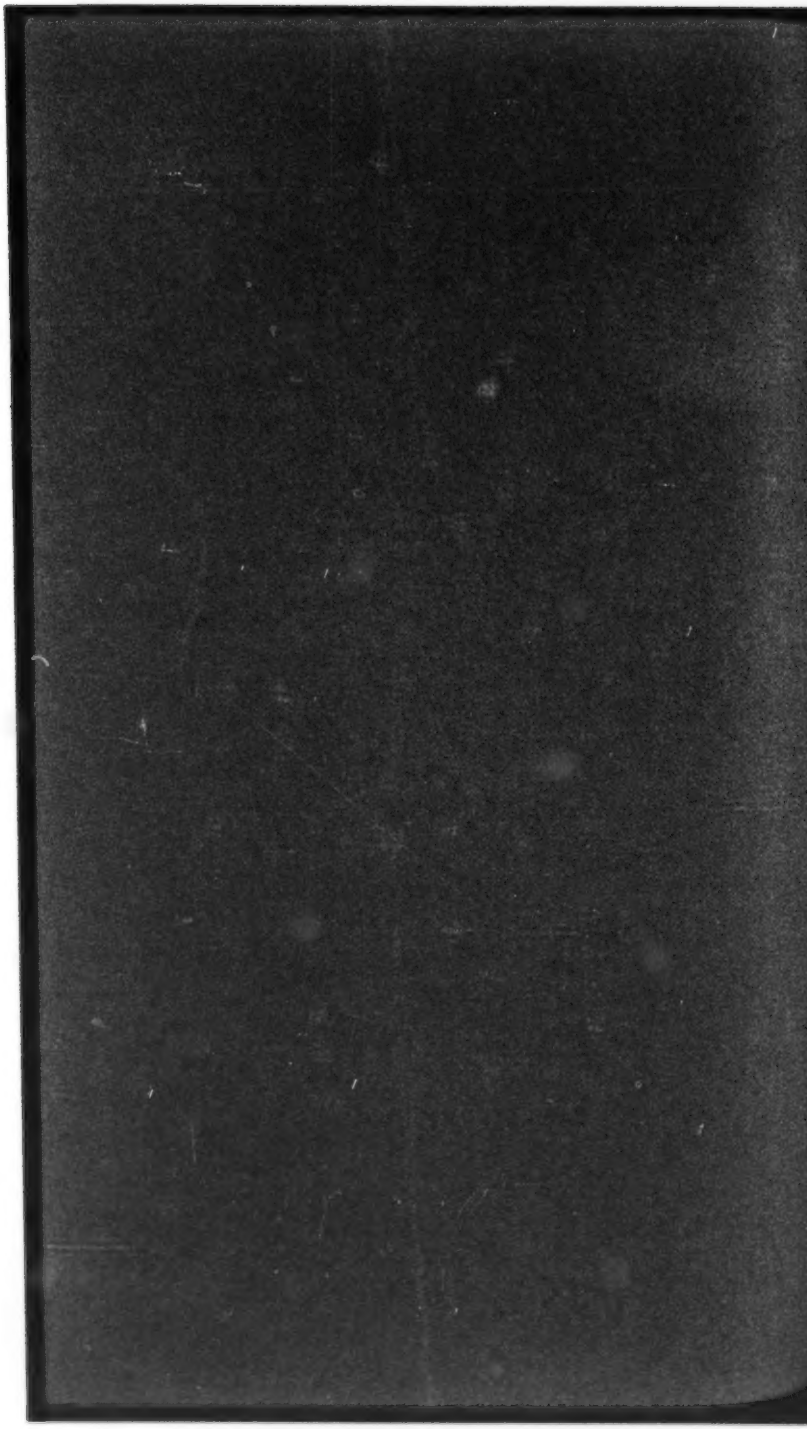

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1927.

MISSOURI PACIFIC RAILROAD COMPANY, Petitioner,		
vs.		No. 100.
MARY I. AEBY, Respondent.		

On Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF AND ARGUMENT FOR RESPONDENT.

I.

In the concurrent findings of the Circuit and Supreme Courts there is an absence of clear and palpable error.

This is an action by a servant against the master under the Employers' Liability Act. This Court is asked to disturb the findings of the State Circuit Court and the Supreme Court of Missouri upon the alleged insufficiency of

the evidence concerning the assumption of risk and negligence. The facts are fully stated in the opinion delivered by the Supreme Court of Missouri (313 Mo. 492), and appended to the record. (See Record, p. 118.) In a general way, the facts are stated and summarized in the brief filed in this court by the plaintiff in error. Reference will be made to the pertinent facts in connection with our argument on the points raised by plaintiff in error. In this record there is, in our judgment, a total absence of such clear and palpable error as would justify this Court in disturbing the ruling made by the Supreme Court of Missouri (**B. & O. R. R. Co. v. Whitacre, 242 U. S. 169**). Our insistence is that there is no error, not even the slightest, in the decision delivered in the state court.

The facts in this record are substantially similar to the facts in the case of **Great Northern Ry. Co. v. Knapp, 240 U. S. 464**, and that case was disposed of by this Court, using the following language (l. c. 466):

> "It was conceded that when the injury was received plaintiff was engaged in work pertaining to the defendant's business as a common carrier in interstate commerce, and that the Federal Act applied. The Court recognized that, if assumption of risk by the plaintiff was made out, it would bar recovery under the act (Seaboard Air Line Railway v. Horton, 233 U. S. 492). The Court charged the jury accordingly, and there was no exception by the defendant to the

charge, or request on its part for any additional instructions, the defendant contenting itself with its motion for dismissal or for a direction of a verdict in its favor. The case, then, is one in which there is no question as to the interpretation of any provision of the Federal Act, or as to the definition of legal principle in its application, but simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury. The state courts, trial and appellate, held that there were. Having regard to the appropriate exercise of the jurisdiction of this Court, we should not disturb the decision upon a question of this sort unless error is palpable. The present case is not of this exceptional character."

The application of the above doctrine should result in the affirmance of the decision of the Supreme Court of Missouri. However, we will respond to the points argued in the brief filed by plaintiff in error.

II.

The defendant, by its answer, admitted all facts necessary to bring this case under the Federal Employers' Liability Act.

The first point relied upon by the defendant is that plaintiff's case is not one under the Employers' Liability Act. This point is not well taken, because plaintiff, by its answer, admitted a state of facts which brings the

case directly within said act. In the answer filed by defendant the following admissions appear (R. 5, 6, 7).

> "Defendant admits that at all the times mentioned in said petition defendant was engaged in commerce between different states of the United States, to wit, between the State of Arkansas and the State of Missouri, and at all such times, as well as at the time of her alleged injury, the plaintiff was employed by defendant in interstate commerce, to wit, as a station agent at Magness, in the State of Arkansas, located on defendant's line of railroad between the City of Newport in said State of Arkansas and the City of Joplin in the State of Missouri, and defendant further admits that the particular train mentioned in plaintiff's petition, to which plaintiff was required to deliver and from which she was required to receive, express, mail and messages, was a train which was operated, and carried passengers and merchandise, between said City of Newport, Arkansas, and said City of Joplin, Missouri" (pp. 5-6).
>
> . . . . . .
>
> "Further answering said amended petition, defendant states that at all the times mentioned in said petition defendant was engaged in commerce between the different states of the United States, as alleged in said petition, and as admitted herein, and that at all such times, as well as at the time of her alleged injury, plaintiff was employed by defendant in interstate commerce, and defendant further states that all of the conditions existing at said station and in and upon said station platform, with respect to either light or the lack of light, to the alleged depression or ditch

in said platform, and the alleged slant of the sides thereof (fol. 15), and with respect to the snow, sleet or ice, if any, therein, as well as whatever dangers, if any, existed as the result of such alleged conditions, were all open and obvious to anyone, and especially to plaintiff, while passing over said platform, and were either known to and appreciated by the plaintiff, or by the exercise of ordinary care on her part could have been known and appreciated by her, and defendant further states that plaintiff assumed all risks of injury incidental thereto or likely to result therefrom while passing over said platform, for which reason plaintiff is not entitled to recover against defendant" (p. 7).

In view of the above admissions showing that in this case defendant relied upon the federal act, set it up and claimed rights under it and never gave the trial court an opportunity to pass upon the claim now presented, we contend the Supreme Court correctly decided such point, and such ruling is in entire accord with the decisions of this Court and the state statutes and established practice in Missouri.

Missouri Pacific R. R. Co. v. Tabor, Guardian of Small, 244 U. S. 200;
Allen v. Missouri Pac. Ry. Co. (Mo. Sup.), 294 S. W. 80, April 11, 1927.

The defendant, however, assumed the position aforesaid in the lower court and there undertook to maintain that

position. It cannot thereafter, because its interests may have changed, assume a contrary position to the prejudice of the plaintiff, who acquiesced in the position then taken by defendant in the state court.

Davis v. Wakelee, 156 U. S. 680, 691;
Daniels v. Tearney, 102 U. S. 415, 421;
Railway Co. v. McCarthy, 96 U. S. 258, 267.

In accordance with the doctrine above stated, and illustrative of same, this Court in an early day held that where the counsel admit in the aggregate the sums reported by the Referee to whom the question of the amount of damages sustained by the sinking of a coal barge was referred, even though that was only with the intention to give the Supreme Court jurisdiction, the sums so reported by the Referee cannot be reduced in the Supreme Court by denying it in detail for the purpose of taking away the jurisdiction of that court.

Chapman v. Forsyth, 2 How. 202, 209, 11 L. Ed. 236.

The defendant, by its instruction No. 3 (Rec., p. 108), requested the Court to instruct the jury, and the Court did instruct the jury that, under the facts set forth in defendant's answer, both defendant and plaintiff were at said time engaged in interstate commerce.

After asking said instruction and after inducing the Court to give it, the Court, at the request of the defend

ant, gave to the jury instruction No. 5 (Rec., p. 109), by which the amount of plaintiff's recovery was diminished in proportion to the way the jury might believe the plaintiff failed to exercise ordinary care for her own safety.

This is a doctrine created by the federal statutes and in direct conflict with the state law, and it is plain that defendant in the trial court attempted to cut down the amount of plaintiff's recovery by invoking the federal statute, and having tried the case on that theory it is intolerable to permit the defendant to change theory and change front in this court.

The allegations of plaintiff's petition are sufficient to state a case under the Federal Employers' Liability Act, and while it is true that the defendant filed a general demurrer at the close of all the testimony, such demurrer did not and could not present an issue as to whether or not the action was under the state law or the federal law, for the reason that defendant by its answer voluntarily conceded and admitted that the cause of action stated in plaintiff's petition was one arising under the federal act.

Mere matters of error may always be waived, and they are waived when the attention of the Court is not called to them.

Montana R. Co. v. Warren, 137 U. S. 348, 351.

A party cannot be permitted to complain in an appel-

late court of the action of the court below, had in compliance with his request.

United States v. Memphis, 97 U. S. 284;
New York Elevated R. Co. v. Fifth Nat. Bank, 135 U. S. 432;
Waterworks Co. v. Barret, 103 U. S. 516;
New York etc. R. Co. v. Estill, 147 U. S. 591;
Cavender v. Cavender, 114 U. S. 464, 471;
Randon v. Toby, 11 How. 493;
U. S. v. St. Louis etc. Transp. Co., 184 U. S. 247, 249;
Baggs v. Martin, 179 U. S. 206, 208;
Gableman v. Peoria etc. R. Co., 179 U. S. 335, 342.

In this case the plaintiff voluntarily invoked the Federal Employers' Liability Act, and it is in the same situation of a plaintiff, who has voluntarily invoked the equity jurisdiction of the Court, and is not in a position to urge, on appeal, that his complaint should have been dismissed because of the adequacy of the remedy at law. And, likewise, a defendant, who answers and submits to the jurisdiction of the Court, and enters into his defense at large, is precluded from raising such an objection on appeal for the first time.

Reynes v. Dumont, 130 U. S. 354, 395;
Kilbourn v. Sunderland, 130 U. S. 505;
Brown v. Lake Superior Iron Co., 134 U. S. 530, 536;
Perego v. Dodge, 163 U. S. 160, 164;
Cowley v. Northern Pac. R. Co., 159 U. S. 569.

Plaintiff's petition charges that the defendant was "guilty of negligence" and then sets forth the acts of omission and commission constituting negligence. The corporation could act only through its officers and agents and hence the petition charges negligence against the officers and agents of the defendant and avers that said negligence created an unsafe condition, to wit, the ditch and depression in the depot platform. It appears to us that said allegation presents a cause of action under either subdivision of the federal act. But be that as it may, the defendant led the trial court to adopt the theory that the case was one under the federal act and by so doing defendant assumed that the word "works" was sufficiently comprehensive to embrace, under the facts in this case, the depot platform. Such being the theory of the defendant, it is bound by it, bound by its pleadings, bound by its instructions, bound by its own construction and cannot urge error even though generally the word "works" is not comprehensive enough to embrace a depot platform.

But in its brief defendant says that the federal act does not apply because after the plaintiff had completed the act of placing the truck at the edge of this platform she was injured while leisurely walking across the platform upon a mission purely for her own convenience (Brief, p. 24), and contends that plaintiff had no further duty to perform until the train arrived, and to avoid the cold weather "she chose to return to the station to there await the arrival of the train, all for her

own convenience" (Rec., pp. 38 and 39), and the defendant further contends that "she was not in the performance of any duty for petitioner at the time of her injury (Brief, p. 33), and at the moment of her injury plaintiff was not engaged in the performance of any duty for petitioner and plaintiff in error says, "For which reason, and for other reasons herein referred to, we contend that the case is not brought within the provisions of the Federal Employers' Liability Act by the facts proved (Brief, p. 22).

This is a palpably unsound doctrine. Her duty required her to take the truck out and her duty also required her to return to the station, and it seems utterly indefensible to contend that when this lady was **returning** to the depot from the doing of one act for her master that she lost momentarily the status of an employe when her act in returning was in futherance of the master's business, viz., placing herself in the depot so she could receive or send messages, sell tickets or otherwise discharge her duties to her employer.

The federal act is the exclusive standard for measuring plaintiff's rights and when it stands admitted that both plaintiff and defendant are engaged in interstate commerce any negligence proved gives plaintiff a right of recovery otherwise a plaintiff could recover under neither the state nor federal laws.

An employe engaged at the time of his or her injuries in receiving and delivering express and mail to and from

an interstate train on a depot platform is engaged in work which is so closely connected with the interstate commerce in which the employer railroad is engaged as to be a part of it.

Pedersen v. D. L. & W. R. Co., 229 U. S. 145;
Roberts, Federal Liability of Carriers, Vol. I, Sec. 457;
Erie R. R. Co. v. Szary, 259 Fed. 181;
Erie R. R. Co. v. Collins, 253 U. S. 81;
Phila. etc. Co. v. Smith, 250 U. S. 103;
Southern Pac. R. Co. v. Payne, 251 U. S. 259;
Southern R. R. v. Puckett, 249 U. S. 573;
Coke & Coal Co. v. Deal, 231 Fed. 604.

This suit was originally brought by plaintiff by the filing of a petition designed to set forth a cause of action for damages at common law. Shortly before the trial of the case defendant filed an amended answer alleging that it was engaged, and respondent was employed, in interstate commerce, and setting up the defense of assumption of risk under the federal statute. Plaintiff was thus placed in the position of being compelled to elect to proceed either at common law or under the federal act. After a careful consideration of the language of the Supreme Court of Missouri in the case of **Elliott v. Payne, 293 Mo. 581**, plaintiff decided that the federal act was applicable, and still contends that it is applicable.

That Court said (Elliott v. Payne, 293 Mo., l. c. 594):

> "It is evidently to these places to which the word 'works' applies. It certainly does not apply to a depot platform, **except so far as such platform may be used by the particular employe as a working place.** The working place of an engineer or fireman is not on a depot platform. A switchman may have his working place in the yards, and other employes have theirs in shops and other working places along the line. But it is evident that a depot platform is not a working place for an engine fireman, and therefore not within the term 'works' as used in the statute."

Again, on the same page:

> "**In a very limited sense it may be a working place for certain classes of employes. Those employes whose duties require them to unload passengers, baggage or freight might say that it was a working place,** but to other employes it would be a mere way of ingress and egress. **Deceased was not in an employment which required him to use the platform as a working place.**"

In **Dietzman v. Screw Company, 300 Mo.,** l. c. 209, a still later case, that Court said:

> "Defendant recognized this **platform** as a place from which repairs were to be made by keeping thereon the short ladder for use in making the repairs. **It thereby became a place of work for deceased,** because it stands admitted that it was his

duty to make the repairs. It was the duty of defendant to use ordinary care to have this working place reasonably safe for the performance of the work there to be done."

Again, on the same page:

"Under the evidence, the short ladder was kept upon this platform for the purpose of repair work which was to be done from the platform. **This PLATFORM was used** (among other uses) **as a place from which to repair the chutes**, butterfly valve and other things between it and the upper platform, ten or twelve feet above it. **For this purpose it was a PLACE OF WORK**, and it was defendant's duty to have exercised ordinary care to have such place reasonably safe for the performance of such work as was to be done therefrom."

Plaintiff's amended petition alleges that it was her duty as station agent to go from the station to the trains for the purpose of receiving and delivering express, mail and messages, and that in so doing she was required to pass over the platform alleged in the petition to be defective. This clearly brought the case within the proviso contained in the opinion in Elliott v. Payne. To this amended petition appellant filed the answer aforesaid, admitting that appellant was engaged, and respondent engaged, in interstate commerce and admitting that

"the particular train mentioned in plaintiff's petition **to which plaintiff was REQUIRED to deliver and**

from which she was REQUIRED to receive express, mail and messages"

was an interstate commerce train.

III.

Under the evidence in this case the state trial court and the Supreme Court of Missouri correctly ruled that plaintiff did not, as a matter of law, assume the risk.

The Supreme Court of Missouri followed and applied the federal rule as to assumption of risk; hence the solution of this question depends upon the facts proved. They are in substance as follows:

The depot of defendant faces north (R. 12). The door to the station is at the west end. The depot platform was constructed of chat, and "chat" was defined as small gravel and crushed up rocks. Some of the pieces of chat were as big as a half dollar (R. 13). The platform was something like a cinder path (R. 13). The platform would absorb water (R. 15) and the ditch or drain would carry it away (R. 28-38). The chat was loose, so that the water could soak down and in (R. 37). The platform extended from the station to the tracks (R. 13), a distance of about ten feet (R. 45). The said platform was not level, but sloped downward from the track to the depot (R. 13), and then the drain sloped towards the west end of the depot (R. 52-56). Two steps led down from the depot to the platform (R. 13). There was a drain or ditch in front of

the steps (R. 13). It extended along the entire north line of the depot building (R. 56). The bottom of this drain was twelve inches lower than the highest part of the platform (R. 13), and water falling on the platform flowed towards the drain or ditch. The drain proper was about four inches lower than the platform immediately adjacent to it (R. 13). In other words, the ditch had "banks" about four inches high. There was a wide place in the drain immediately in front of the depot door, said wide place being about four by five feet (R. 13). This wide place or depression was caused by wear, resulting from persons passing in and out of the depot and by the action of the water flowing from the depot roof and the sloping platform (R. 13). This wide place or depression had a rough, uneven surface (R. 17-61), and on the night of plaintiff's injury these rough, uneven places were covered with ice and snow (R. 39-40). The entire depression was covered with ice (under snow) immediately in front of the depot steps (R. 43). Plaintiff commenced to work for defendant in July, 1920, and the ditch or depression was in the platform at that time, but was not so deep and well defined as it was in January following (R. 53). It was constantly wearing wider, longer and deeper (R. 56). It would wear deeper when more rain fell (R. 56), and by the travel of passengers. The rain which fell the night of the accident washed the ditch deeper (R. 56).

The plaintiff slept in the depot. She waited upon the evening train some time between 6:41 and 9 p. m. on Jan-

uary 12th and did not leave the depot until the following morning at 6:10, when the accident happened (R. 15). The weather was cloudy (R. 29), not stormy, when she waited on the train on the evening of the 12th (R. 15), but later that night she noticed that it was raining (R. 15). She retired for the night without obtaining any further knowledge of the weather and awoke about 6 a. m. on the next day (R. 15) and went out on the platform and placed a truck in position to receive mail and express from a train due at that station at 6:18 a. m. It was 6:10 when plaintiff went out (R. 15). The platform was covered with about three inches of snow (R. 15). She noticed ice on the truck (R. 32, 43), but placed the truck in its proper position, and she did not slip or slide (R. 39) while engaged in this work. The ice was not on the platform when plaintiff and her companion went to bed that night (R. 88).

The plaintiff, describing her return to the depot and the accident, testified:

> "I caught my foot upon rough ice. I got caught on those rough pieces. The ice was all covered with snow. As I came along this trench, or ditch, or drain, I stepped on that and my foot slipped—slipped on the ice that formed there during the night before. I was then walking south towards the station. When I walked across that platform I felt places raised along the ice in front of the door—just in front of the door. These raised places were only in the ditch. The ice

in the wide place in the ditch in front of the doorway was about three or four feet long and directly in front of the steps. Yes, sir; I know I tripped on something rough in this place (R. 37). It was snowing at the time I put the truck out there (R. 40). I had an oil lamp in the ticket office. It was on the stand that we moved around. That was the only way of lighting this depot. I knew before I started back after placing this truck that it had sleeted and frozen, but I did not notice anything unusual (R. 44). I did not know the ice was before the door. I knew it had sleeted and snowed, but I did not know the ice was before the door. I did not know there was ice in this depression. I did not know that ice had formed elsewhere. I did not notice anything unusual. I knew ice had formed on the truck and knew it had been cold enough to freeze (R. 44). I knew if one steps on ice you are liable to slip, but I did not know there was ice there. I did not know it at that time. When I went out on this platform it was very dark. You might see a person maybe ten feet from you. You could not see across the platform from north to south. It was dark and the sky was all cloudy and I found it had sleeted and snowed. I observed rains before that on the platform. I had observed that water was running before the door and that the platform would absorb water (R. 15). In going out that morning I stepped off the west end of the steps going west. When I went out to get the truck I did not notice anything in connection with the station in front of those steps. I returned to the depot coming practically from the north (R. 16). I did not observe the condition of this depression before I fell. I did ob-

serve it after I fell. It was covered with snow and ice. The surface was rough and uneven. I fell in this drain or depression. Yes, I remember how I slipped there—was first thrown backwards and then forwards into the ditch" (R. 17).

The Supreme Court of Missouri quotes from the Horton case, 233 U. S. 492, and gives it full force and effect, and measuring plaintiff's rights by said rule says that under said testimony

> "plaintiff did not know or apprehend there was ice in the depression under the snow, nor did she appreciate the danger of stepping thereon,"

and, therefore, correctly decided that plaintiff did not assume the risk.

In **Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492,** this Court said:

> "But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect of disrepair and of the risk arising from it, unless the defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them."

The Supreme Court of Missouri quotes the above language from the Horton case, follows it, and applying the rules of law therein contained holds that under the evidence in this case plaintiff did not assume the risk. We submit that the conclusion of the Supreme Court of Missouri is the only permissible conclusion under the facts in this case.

The facts constituting negligence in the case at bar are entirely different from the facts upon which the cases cited by plaintiff in error turned. In the case at bar the conditions from which negligence arises were not fixed or permanent. The ditch or drain was subject to continual change and was enlarged, deepened and changed by the action of the rain which fell during the night. The dangerous features resulted in part from the formation of ice on an irregular surface and this ice and irregularity were effectively concealed by two or three inches of snow. The water falling on the platform was generally absorbed by sinking into the porous chat platform or ran off through the channel leading to the west end of the depot and beyond. Plaintiff did not know that water had accumulated in the wide part of the ditch, did not know that the ditch was rough and uneven on its sides and bottom, did not know that there was anything there to "trip" her or cause her to fall.

Counsel for plaintiff in error in the last analysis asks this Court to hold that plaintiff assumed the risk because

she **should** have known that there was ice in the depression. Learned counsel say:

> "It is not imposing too great a burden upon respondent for the law to say that she **should**, in the exercise of that reasonable care which the law demands of all persons, have known that there was ice in this depression" (Brief, p. 52).

The plaintiff, by direct inference, concedes that if that premise does not exist, then there is no assumption of risk in this case as a matter of law.

The doctrine that plaintiff "should by care have known," etc., cannot be sustained for: (a) Plaintiff did not know how much rain had fallen; (b) she did not know whether all the rain that had fallen had been absorbed by the porous platform; (c) she did not know that all the rain which had fallen had not run off through the ditch leading to the west end of the depot; (d) from noticing ice on the parts of the truck she could not know whether the rain had fallen before or after the snow—nor could she tell how heavily it had rained; (e) she had no knowledge as to when the rain commenced, how long it lasted, or when it ceased, and, therefore, did not know that sufficient time had not elapsed for all the water in the depression to be absorbed or carried off before it froze into solid ice; (f) the hour was dark and the ice was covered by a three-inch coating of snow—which snow covered the depression

or ditch and concealed the uneven sides and irregular bottom.

Her duties required her to pass over this negligently constructed ditch early in the morning, while it was yet dark, and shortly after the fall of rain and snow. When she last saw the ditch or depression on the evening before it was dry and no snow or ice upon it, and it was no part of her duty to inspect it or keep it in a safe condition. The platform was negligently constructed of improper material, and the defendant company was bound to know a platform built of such material (evidently shoveled in loose) would by use create an irregular surface containing ditches and depressions likely to produce injury to persons using it when covered with sleet and snow, but such conditions were not obvious to plaintiff at the time she was injured, and it not being obvious she neither assumed the risk nor was she guilty of contributory negligence, and the Supreme Court of Missouri followed the doctrines of this Court in so holding.

The answer of defendant, after averring that all the defects and imperfections in the platform were open and obvious to anyone while passing over the platform, then concludes by using this language relating to said defective conditions:

> "* * * were either known to and appreciated by the plaintiff or, by the exercise of ordinary care on her part, could have been known and appreciated by her."

Therefore it appears from said answer that defendant has not properly pleaded the defense of assumption of risk, the answer averring in substance that the defects were obvious **only** to anyone who would exercise ordinary care to search for them. Such, of course, is not the law as declared by this Court, and the language of the Supreme Court of Missouri criticized by plaintiff in error is not subject to criticism. The Court was responding to and combating this theory of "ability by care to discover" the Master's negligence contained in the answer, namely, that a servant assumes the risk if he could, by exercising ordinary care, discover the master's negligence and the danger likely to follow therefrom. The Supreme Court of Missouri referred to the state rule that "the servant never assumes a risk of injury created by negligence," and used almost the identical language used by Justice Fuller in the O'Brien case (161 U. S., l. c. 452), to wit: "He does not take the risks of the negligence of the master itself." The language used by the Supreme Court of Missouri was by way of illustration or argument in opposition to the "ordinary care" doctrine set forth in defendant's answer. However, it is manifest that the Supreme Court of Missouri did not decide this case upon the Missouri theory, but did decide it in strict accordance with the theory as announced by the Court in the **Horton case**, supra, and other cases following it.

This case is not ruled by the class of cases cited by the plaintiff in error. The principles applicable to the facts

in this case, relating to assumed risk, are contained in another line of cases dealing with facts analogous or similar in legal effect to the facts proved in the case at bar. We refer to a few of such cases, and they are as follows:

In Union Pacific Railway Co. v. O'Brien, 161 U. S., l. c. 452, the evidence tended to show that an engineer was bringing a freight train from Como, Colorado, to Denver; that the engineer left Como at 8 o'clock on the evening of September 3, 1890, and that the accident occurred at 1 o'clock in the morning of September 4; that the line of railway followed the course of the South Platte River, and that there were numerous cuts thereon, caused by the intersection of the line with the spurs projecting from the foothills of the mountains, along which the line was built; that the locomotive was derailed by reason of sand and gravel, which had been deposited on the track to a depth of some seven or eight inches and to the extent of from ten to twenty feet; that this deposit was in a cut, approached by a curve to the left and then curving to the right as the track entered the cut—a double curve; that the river bank of the cut was about seven or eight feet high, the other bank being much higher and very steep, sloping back up the mountainside; that down the upper bank ran a narrow gully, which, in rainy weather, brought down water, carrying sand and disintegrated rock; that this gully had had an outlet into the river before the track was constructed across it; that there was no opening or culvert under the railroad track through which the

water and material brought down could escape; that a small ditch ran alongside the roadbed, but if the water coming down was greater in quantity than this ditch could carry, then the surplus would run over and upon the tracks of the railroad; and that rain had fallen the evening previous to the accident, and the water rushing down the gully had deposited this mass of sand and gravel upon the track. Upon this state of fact the railroad contended that the engineer assumed the risk, but this Court ruled otherwise, and said:

> "The servant undertakes the risk of the employment as far as they spring from defects incident to the service, but he does not take the risks of the negligence of the master itself. The master is not to be held as guaranteeing or warranting absolute safety under all circumstances, but it is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, track and other structures, including sufficient culverts for the escape of water collected and assimilated by its embankments and excavations" (161 U. S. 457).
>
> "There are cases in which, if the employe knows of the risk and the danger attendant upon it, he may be held to have taken the hazard by accepting or continuing in the employment, but this case, as left to the jury under the particular facts, is not one of them. This engineer was entitled to rely upon the company as having properly constructed the road, and to presume that it had made proper inquiry in respect of latent defects, if there were any, in the construction, for such was its duty, and

be cannot be held to knowledge of the danger lurking in this narrow seam in the mountainside by whose inequalities its sinuosities were hidden" (p. 458).

The **O'Brien case** was heard by the Court of Appeals (49 Fed., l. c. 548), and among other things the Court of Appeals said:

"The training and knowledge of an engineer is not needed to enable one to understand the action of water in rushing down a gully or similar waterway, nor to know if an obstruction like a solid railway roadbed is built across a waterway, down which any considerable amount of water may be expected to pass, that, unless an outlet is given to it, it must of necessity collect against the roadbed, and perchance overflow it. Such facts are matters of common knowledge, gathered from the experience and observation of everyday life, and hence a jury is entirely competent to pass upon an issue involving considerations of that nature."

In the case of **Chesapeake & Ohio Ry. Co. v. Deatley, 241 U. S. 310**, the plaintiff, a head brakeman, had been injured whilst attempting to mount a freight train in motion. The mounting could be made with reasonable safety if the train was running at a moderate rate of speed. There was some risk in so mounting. The train in question was running at the rate of twelve miles an hour, and the claim was that this was an unusually dangerous rate

of speed at which to mount the train, and that the engineer was negligent in running it at that rate, and if the injured party could have discovered that the train was being run at a negligent rate of speed he assumed the risk.

Mr. Justice Pitney stated defendant's position thus:

> "It is insisted that the true test is, not whether the employe did, in fact, know the speed of the train and appreciated the danger, but whether he ought to have known and comprehended; whether, in effect, he ought to have anticipated and taken precautions to discover the danger."

To this he responded:

> "This is inconsistent with the rule repeatedly laid down and uniformly adhered to by this Court. According to our decisions, the settled rule is, not that it is the duty of an employe to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employe may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of car and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

In the case of **Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 68**, the jury were instructed that if the deceased em-

ployé either knew of the danger of collision with the water spout, or, by the observance of ordinary care upon his part, ought to have known of it, no recovery could be had. Mr. Justice Day, as to this portion of the charge, said:

> "The charge of the Court upon the assumption of risk was more favorable to the plaintiff in error than the law required, as it exonerated the railroad company from fault if, in the exercise of ordinary care, McDade might have discovered the danger. Upon this question **the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employe.**"

In Oregon Short Line & U. N. Ry Co. v. Tracy, 66 Fed. Rep. 931, a plaintiff, while stationed as a lookout near the front end of cars which were being pushed along a spur track, was thrown forward by a collision with a car standing on the track and injured. Brush overhung the track and obscured the view. Held by the Circuit Court of Appeals (9th Circuit) that it was a question for the jury whether or not plaintiff assumed the risk attendant on such condition of the track, and the Court pointed out the difference in the rule applicable to changing conditions and fixed or permanent conditions and said:

> "But he does not necessarily know, and he cannot be expected to meet, dangers which arise from changes in those conditions, however apparent may be the causes which produce them. He is not presumed to know that the rains and floods will have covered the

track with earth and sand at a place where common prudence would require that provision be made against the occurrence of such an obstruction. He is not required to assume that ice and snow will be allowed negligently to accumulate upon the track and swtiches, or that other obstructions will be placed on or about the same, so as to render the track unsafe, or his work more dangerous than it otherwise would be."

Oregon Short Line & U. N. Ry. Co. v. Tracy, 66 Fed. Rep. 931-935.

Cincinnati N. O. & T. P. Ry. Co. v. Thompson (C. C. A., 6th Cir.), 236 Fed. 1, is a well considered case and, after full and candid discussion, it was held that a brakeman injured when he stepped on a large piece of slag in alighting from a train did not assume the risk of injury as a matter of law, even though he knew smaller pieces of slag may have been at the place where he alighted. The Court in said opinion points out that the doctrine of assumption of risk necessitates an

"immediate knowledge obtained from pure observation. It does not cover conclusions or inferences from such knowledge" (236 Fed. 11).

The decision of the Supreme Court is in strict accord with the numerous decisions of this Court as to assumption of risk, and also in accord with the decisions of other courts whose pronouncements are entitled to great weight. We refer to a few typical cases from other jurisdictions.

In **Bowen v. Worumbo Mfg. Co., 105 Me. 31, 72 Atl. 685,** plaintiff had been an employe of defendant for sixteen months. Ice formed on a stairway over which plaintiff was required to pass, due to the melting of snow on the roof. The ice was covered with snow. Plaintiff knew that ice had previously formed on the steps. Plaintiff slipped and fell while leaving the premises at noon. In holding there was no assumption of risk as a matter of law the Court said:

> "It is insisted, however, by the defendant, that the plaintiff must have known of the danger, and that in attempting to descend the stairs in that condition she voluntarily assumed the risk of so doing. But it is settled law that a general knowledge of a danger, without an appreciation of it, is not conclusive upon the question of the assumption of risk (Frye v. Bath Gas & Elec. Co., 94 Me. 17, 46 Atl. 804). And in the case at bar it has been noted that the duty of the defendant, prior to the accident, had frequently been performed by cutting and removing the ice from the stairway, and that thus its condition necessarily changed from time to time. When, therefore, this fact is considered with the testimony of the plaintiff that she did not see any ice there before she fell, and the absence of any direct evidence that she knew that there was ice concealed under the snow on the steps at that time, **it cannot be said as a matter of law that she understood and appreciated the dangerous condition of the stairs,** and hence voluntarily assumed the risk of attempting to use them."

To this same effect is the decision of the Massachusetts Court in Fitzgerald v. Conn. River Paper Co., 155 Mass., l. c. 162, 29 N. E. 467, 31 Am. St. Rep. 537, a case in which the facts were analogous to those at bar, but more favorable to the defendant. In the opinion the Court say:

> "We are of opinion that it cannot be said, as a matter of law, that the plaintiff in the present case, in attempting to go down the steps voluntarily, assumed a risk which she understood and appreciated which resulted in the accident. She knew that the steps were icy, and that there was some danger in passing over them; but the evidence tended to show that this slipperiness was constantly changing in different states of the weather, with the spray falling daily from the steam pipe and freezing upon them. Common experience tells us that the degree of slipperiness of ice is not always determinable from an ocular inspection of it. (See, also, Osborne v. London & North Western Railway, 21 Q. B. D. 220, a case precisely in point.)"

In Rogers v. Davis, 228 Pac. Rep., l. c. 332, a case under the Federal Act, where a brakeman slipped on an accumulation of snow, ice, dirt and debris between the company's track, the Court said:

> "Something is said in appellant's brief about assumption of risk. Under the evidence it cannot be contended that the deceased assumed the risk incident to the accumulation of ice in question (Union

Pacific Ry. Co. v. O'Brien, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766).

"'A risk arising from the master's failure to provide a reasonably safe place and machinery is not an ordinary risk, but an extraordinary one, and is not assumed by the servant unless it is clearly shown that he both knew the facts out of which the risk arose **and appreciated the danger'** (Bressan v. Herrick, 35 Idaho 217, 205 Pac. 555).

"It cannot be said, as a matter of law, that the evidence clearly shows deceased knew about the ridge of ice and appreciated the danger."

In Burdick v. Chicago & N. W. Ry. Co., 123 Minn. 105, 143 N. W., l. c. 116, 117, a suit under the Federal Act, where a brakeman was injured by his feet catching in a snowdrift, the Court said:

"Passing the question whether the defense of assumption of risk is open under the Federal Act in a case like this, with the remark that if it is it comes near nullifying the provision of the act removing contributory negligence as a defense, we have no difficulty in holding that in the case at bar the question of assumption of risk was for the jury. **Plaintiff, while he could have seen the drift had he looked that way, did not, in fact, see it. And he did not know that the snow at that point was packed and crusted.** He had not before switched in this yard in the daytime. We are unable to hold, as a matter of law, that he ought to have known and appreciated the danger."

IV.

There was ample evidence of sufficient facts to establish defendant's actionable negligence, and the Supreme Court of Missouri did not err in so holding.

The opinion of the Supreme Court of Missouri responded to the contention that the evidence was insufficient and answered it so fully and completely that we adopt the language that Court used in disposing of that contention as our argument. It seems absolutely sound, and is as follows:

> "1. It is insisted that the petition does not state facts sufficient to constitute a cause of action, because it fails to allege that the defendant either knew, or by the exercise of ordinary care could have known, of the alleged negligent conditions, or that they had existed for a sufficient length of time to enable defendant, by the exercise of ordinary care, to have discovered and remedied them.
>
> "The petition alleges that at the time of plaintiff's injury, and for a long time prior thereto, the surface of the platform was composed of chat and fine gravel so loosely put together that depressions, holes or drains were formed in it; that the platform and station were so negligently constructed that the platform sloped towards the door of the station and the station had no gutters on the eaves of its roof; that a depression formed in front of the door to the station; that the chat or gravel was carried away from in front of said door by persons passing in and out of the

station and the water falling on the station and on the platform flowed towards this depression, forming a ditch, and that in cold weather, when rain, snow and sleet fell, ice formed in this ditch and depression, and formed a slick, ice-covered and irregular surface, rendering it unsafe and dangerous for a person to step into or upon; that when plaintiff slipped and fell, the depot platform was dark and unlighted and that she had no knowledge that said platform was in said dangerous and unsafe condition, nor could she have knowledge of such fact by the exercise of ordinary care, etc.

"'Where it appears from the complaint that the defect is a defect of construction, the authorities do not require an allegation of the employer's knowledge of the defect'" (6 Thompson's Comm. on the aw of Negligence [2nd Ed.] 533).

"'Where the defect in an appliance is shown to be structural and of such a character as renders it unsafe it may be inferred that the employer was aware of the defect and an employe who has been injured by such an appliance need not show that the master knew it was defective'" (26 Cyc 1144, and cases cited in note 86).

"In Dietzman v. St. Louis Screw Company, 300 Mo. 196, 210, 254 S. W. 59, Judge Graves said:

"'Nor is there question as to the fact that defendant knew of the situation in ample time to have remedied it before the accident. In fact, it constructed the place, and, when it made it a working place, was bound to know its condition.'

"Elliott v. Payne, 293 Mo. 581, 239 S. W. 851, was an action based on the Federal Employers' Liability Act for the death of a locomotive fireman charged to

have been caused by a defective platform. Judge Graves said:

"'Plaintiff had evidence tending to show that at places the bricks were lower than the curbing, and this condition permitted the accumulation of water and ice. Whether the defects were in the original construction or appeared later by reason of use and the sinking of the bricks into the base upon which they were placed can make no material difference. The charge in the petition is that the defendant maintained the platform in a defective condition.'

"In Sankey v. Chicago etc. Ry. Co., 118 Iowa 39, 91 N. W., l. c. 821, the Court said:

"'It is first urged that defendant cannot be held negligent because of the presence or accumulation of ice and snow upon its tracks and yards. Within certain limitations, this is the correct doctrine. Climatic conditions—heat, sold, rain, snow and ice—are beyond the control of the employer, and the mere fact of their existence or occurrence does not tend to negative the exercise of reasonable care. But it does not follow that a case cannot arise where the presence or existence of some of these elements is so combined with want of reasonable care by a railroad company in the maintenance of its tracks and yards as to create a danger which is not naturally or necessarily incident to a brakeman's labor. The work of coupling and uncoupling cars, making up trains, taking and discharging freight, opening and closing switches is done almost exclusively within the yard limits of the stations along the line of road, and within reasonable limits, the obligation of the master to furnish his servant a safe place in which to work applies to these

yards as imperatively as to the repair shops or to the general offices of the company.'

"See, also, Gibson v. Railroad, 115 Minn. 147, 131 N. W. 1057; Keitel v. St. Louis Cable Company, 28 Mo. App. 657, and Combs v. City of Kirksville, 134 Mo. App. 645, 114 S. W. 1153.

"Reasonable and ordinary care must be determined in the light of the dangers to be reasonably anticipated. The defendant must be presumed to know that many persons would pass over this platform and that holes or depressions would form in the loose chat or broken pieces of stone of which it was formed, particularly in front of the door to the waiting room; that rain would fill such holes with pools of water; that in the winter season these pools of water would freeze and were likely to be covered with snow and become unsafe for persons walking on the platform. In the exercise of ordinary care the defendant was bound to anticipate and make reasonable provisions for such contingencies, 'for what a man knows and should know are equivalent in law' (Benton v. St. Louis, 248 Mo. 98, 109, 154 S. W. 473; Schiller v. Kansas City Breweries Company, 156 Mo. App. 569, 577, 137 S. W. 607; Johnson v. Railroad, 164 Mo. App. 600, 622, 147 S. W. 529; Bowen v. Ry. Co., 95 Mo. 268, 275, 8 S. W. 230; Beane v. City of St. Joseph [Mo.], 256 S. W. 1093, 1095; Merritt v. Telephone Co., 215 Mo. 299, 310, 115 S. W. 19; Smith v. City of St. Joseph, 42 Mo. App. 392, 398; Heether v. Huntsville, 121 Mo. App. 495, 499, 97 S. W. 239; 3 La Batt, Master and Servant [2nd Ed.] 2750). The contention is devoid of merit."

From a consideration of the facts in this record we submit the finding of the Supreme Court of Missouri is

well supported and applies well-settled principles of law universally adhered to by this Court.

V.

The sole cause of plaintiff's injuries was not plaintiff's contributory negligence.

The recitals set forth in the discussion of the two previous points refer to and set forth the negligence proved and charged against this defendant. That it was actionable negligence is demonstrated. That the plaintiff was not guilty of contributory negligence in the sense that it was the **sole** cause of the accident also clearly appears from a consideration of said facts. If she was guilty of contributory negligence which **fell short of being the sole cause** of the accident she has been penalized for that by instruction No. 5 given for the defendant, directing the jury to make a corresponding reduction in the amount of her recovery.

The degrees of care required of the master and servant differ and the degree of care imposed by law upon the master is greater than that imposed upon a servant. As said by Judge Sanborn in **Union Pac. Ry. Co. v. Jarvi, 53 Fed. 69**, the master is required to use care in the preparation and subsequent inspection and

> "the circumstances in which the master is placed are generally so widely different from those surrounding the servant, and the primary duty of using care to

furnish a reasonably safe place for others is so much higher than the duty of the servant to use reasonable care to protect himself in a case where the primary duty of providing a safe place or safe machinery rests on the master, that a reasonably prudent person would ordinarily use a higher degree of care to keep the place of work reasonably safe if placed in the position of the master who furnishes it than if placed in that of the servant who occupies it."

As said in Labatt's Master & Servant, Vol. 4, 2nd Ed., p. 3792:

"The decisions also show that the courts do not consider it justifiable to impute knowledge to a servant, as a matter of law, on the ground that his means or opportunities of knowledge were equal or superior to those of the master, unless the risk to which the injury was traceable belonged to the class to which the description 'obvious,' 'visible,' 'manifest,' etc., is applicable."

We respectfully submit that the judgment of the Supreme Court should not be disturbed.

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SUPREME COURT OF THE UNITED STATES.

No. 100.—October Term, 1927.

Missouri Pacific Railroad Company, Petitioner, vs. Mary I. Aeby.	On Writ of Certiorari to the Supreme Court of Missouri.

[January 3, 1928.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner is a common carrier of interstate commerce by railroad. Respondent was its station agent at Magness, Arkansas; and, January 13, 1921, while employed in such commerce, fell on the station platform and was injured. She brought this action in the Circuit Court of Saint Louis, Missouri, claiming damages under the Federal Employers' Liability Act, U. S. C., Tit. 45, c. 2, § 51, on the ground that her injuries resulted by reason of a defect or insufficiency in the platform due to petitioner's negligence. The jury returned a verdict, and the court entered judgment thereon, in her favor. Petitioner took the case to the Supreme Court and contended that the platform was not a part of its "works" within the meaning of the Act; that the evidence was not sufficient to sustain a finding that petitioner was guilty of actionable negligence; that respondent assumed the risk, and that her own negligence was the sole cause of her injuries. That court decided all these questions adversely to the petitioner and affirmed the judgment. 313 Mo. 492. Certiorari was granted 273 U. S. 679.

The Act makes the carrier liable for injuries resulting to its employes by reason of any defect or insufficiency due to its negligence in "its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment". The language is broad and includes things and places furnished by the carriers to be used by their employees in the performance of their work. The platform was intended to be and was used by respondent to do station work. Having regard to the beneficent purposes of the Act, it would be

unreasonable to hold that when so used a station platform is not covered by the word "works" in the above quoted provision. The Supreme Court rightly held that the clause applied.

Respondent had lived for years in that part of Arkansas. She was petitioner's ticket agent at Morefield from March 20, 1919, until July 2, 1920; then she became the station agent at Magness and remained in that position until a few days after she was injured. She had charge of the station; did book work; sold tickets; handled mail, baggage, express, etc. She was the only person regularly performing station work; and, for some time before the accident, she lived in the station building. It was a one-story structure 16 feet wide by 48 feet long located south of, parallel to and 10 feet from the track. The waiting room occupied the west end, and adjoining it there was an office having a bay window toward the track. The waiting room door, in front of which were two steps, was just west of the bay window. The platform was made of "chat", described as small gravel and crushed stone. It was something like a cinder path. There were no gutters on the eaves and water falling from the roof made a depression or kind of ditch. The chat was loose and sloped toward the building, and some of the rain falling on the platform, as well as the water from the roof, reached the depression under the eaves and drained past the steps to the west. The depression was about four inches deep; and, by reason of the slope, its bottom was about 12 inches lower than the highest part of the platform. The depression existed when respondent came to work at Magness, and in front of the steps it was about four feet square. That condition was caused by water and the passage of people going to and from the waiting room. When it rained, there accumulated in this and other depressions on the platform puddles of water which gradually disappeared. By the time of the accident, the depression in front of the steps had become somewhat larger and deeper by reason of rains and constant use. Its surface was rough. No ice had formed there after respondent came. The platform was dry the evening before the accident. During the night it rained, froze and snowed. Respondent and another woman slept in the station. A train was due shortly after six in the morning. They got up about six; it was dark; respondent lit a lamp and also a lantern that was kept for use about the place. They went out and moved the truck from the

west end of the building to a place near the track. The steps were covered with snow and ice. There was about three inches of snow on the platform; the truck was frozen to the ground and covered with ice. There was no light on the platform. The lamp and lantern were left inside, and it does not appear that either was placed to give light through the bay-window or otherwise upon or about the steps or platform. Going out, respondent stepped off the west end of the steps. When returning to the waiting room, she approached from the north. There was ice under the snow immediately in front of the steps; she tripped on something rough, slipped, fell and was injured.

This case is governed by the Act and the applicable principles of common law as established and applied in Federal courts. There is no liability in the absence of negligence on the part of the carrier. *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 501; *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147, 150. Its duty in respect of the platform did not make petitioner an insurer of respondent's safety; there was no guaranty that the place would be absolutely safe. The measure of duty in such cases is reasonable care having regard to the circumstances. *Patton* v. *Texas & Pacific Railway Co.*, 179 U. S. 658, 664; *Washington &c. Railroad Co.* v. *McDade*, 135 U. S. 554, 570; *Tuttle* v. *Milwaukee Railway*, 122 U. S. 189, 194. The petitioner was not required to have any particular type or kind of platform or to maintain it in the safest and best possible condition. *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, 529. No employment is free from danger. Fault or negligence on the part of petitioner may not be inferred from the mere fact that respondent fell and was hurt. She knew that it had rained and that the place was covered with ice and snow. Her knowledge of the situation and of whatever danger existed was at least equal to that chargeable against the petitioner. Petitioner was not required to give her warning. *National Biscuit Co.* v. *Nolan*, 138 Fed. 6, 12. It is a matter of common knowledge that almost everywhere there are to be found in public ways and on private grounds numerous places in general use by pedestrians that in similar weather are not materially unlike the place where respondent fell. Under the circumstances, it cannot reasonably be held that failure of petitioner to remove the snow and ice violated any duty owed to her. The obligation in respect of station platforms and the like owed by carriers to their passengers or to others

coming upon their premises for the transaction of business is greater than that due their employees accustomed to work thereon. The reason is that the latter, familiar with the situation, are deemed voluntarily to take the risk of known conditions and dangers. *Tuttle* v. *Milwaukee Railway, supra*, 194. The facts of this case, when taken most favorably to the respondent, are not sufficient to sustain a finding that petitioner failed in any duty owed to her. *Nelson* v. *Southern Ry. Co.*, 246 U. S. 253. As negligence on the part of the petitioner is essential, we need not consider its contentions in respect of assumption of risk and negligence on the part of respondent.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.